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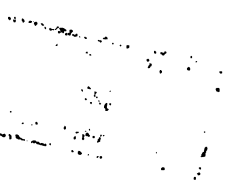
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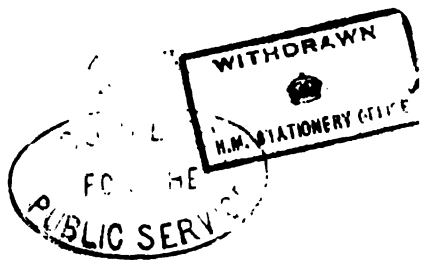
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# A TREATISE

ON

## CRIMES AND MISDEMEANORS.

---

### BOOK THE FOURTH.

#### OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

---

#### CHAPTER THE FIRST.

##### OF MURDER.<sup>1</sup>

##### SEC. I.

##### *Definition of offence.<sup>2</sup>*

MURDER is the killing any person under the King's peace, with malice prepense or aforethought, either express or implied by law. (*a*) Of this description the malice prepense, *malitia præcogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide; (*b*) and it will therefore be necessary to inquire concerning the cases in which such malice has been held to exist. It should, however, be observed, that when the law makes use of the term malice aforethought as descrip-

(*a*) 3 Inst. 47, 51. 1 Hale, 424, 448, 449. 1 Hawk. P. C. c. 31, s. 3. Kel. 127. Fost. 256. 2 Lord Raym. 1487.

4 Blac. Com. 198. 1 East, P. C. c. 5, s. 2, p. 214.

(*b*) 4 Blac. Com. 198. *Gastineaux's case*, 1 Leach, 417.

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#### AMERICAN NOTES.

<sup>1</sup> In many of the United States only murder which is accompanied by a deliberate intention to take life is punished with death, and all other kinds of murder are treated as homicide in the second degree. Deliberation, however, for a single moment, has been held to be sufficient to constitute murder in the first degree; but the state of mind of the prisoner, and the weapon used, thus become very important elements in deciding whether the murder was deliberate or not. In murder in the first degree, malice aforethought, or rather a premeditated intention to slay, must be proved. See

*Davis v. S.*, 39 Md. 355. *Green v. C.*, 12 Allen (Mass.), 155, and *Bishop*, i. s. 600; ii. ss. 723-730.

<sup>2</sup> In most of the States of America the distinctions between murder and manslaughter are the same as in England; but in New York and some of the States there are statutes in some degree limiting the definition of murder, or reducing certain acts to manslaughter. *Bishop*, ii. ss. 720, 721, 722. See *C. v. Webster*, 5 Cush. (Mass.), 295. *Wharton on Homicide*, 2nd Ed. ss. 660-664.

tive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. (c) And in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed; but also, in many other cases, such killing as is accompanied with circumstances that shew the heart to be perversely wicked, is adjudged to be of *malice prepense*, and consequently murder. (d)

Malice may be either *express* or *implied* by law. Express malice is, when one person kills another with a sedate deliberate mind and formed design: such formed design being evidenced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. (e) And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden: (f) thus where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. (g) So if a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. (h) And where one is killed in consequence of such a wilful act as shews the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. (i)

(c) Fost. 256, 262.

(d) 1 Hawk. P. C. c. 31, s. 19. Fost. 257. 1 Hale, 451 to 454.

(e) 1 Hale, 451. 4 Blac. Com. 199.

(f) 1 East, P. C. c. 5, s. 2, p. 215.

(g) 4 Blac. Com. 200.

(h) 1 Hale, 455. 4 Blac. Com. 200.

(i) 1 Hale, 474. 1 Hawk. P. C. c. 29, s. 12. 4 Blac. Com. 200. 1 East, P. C. c. 5, s. 18. *Malitia*, in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person: but this is not the legal sense; and Lord Holt, C. J., says: 'Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact, which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy*, *hatred*, and *malice* are three distinct passions of the mind.' Kel. 127. Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it (*De Nat. Deor. Lib. 3, s. 30*) as '*versuta et fallax nocendi ratio*'; and in another work (*De Offic. Lib. 3, s. 18*) he says, '*mihi quidem*

*etiam veræ hæreditates non honestæ videntur si sint malitiosis* (i. e. according to Pearce, a *malo animo profectis*) *blanditiis officiorum; non veritate sed simulatione quæsitæ.*' And see Dig. Lib. 2, Tit. 18, Lex 8, where, in speaking of a banker or cashier giving his accounts, it is said, '*Ubi exigitur argentiarius ratione edere, tunc punitur cum dolo malo non exhibet . . . Dolo malo autem non edit, et qui malitiose edidit et qui in totum non edit.*' Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam*, says, 'if one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a just cause.' 2 Inst. 384. And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptance of anger or desire of revenge against another. Thus where the 25 Hen. 8, c. 3, says, that persons arraigned of petit treason, &c., standing 'mute of malice or froward mind,' or challenging, &c., shall be excluded from clergy, the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some



And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse, or justification: (j) and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him. (k)<sup>2</sup> It should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of

just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. 1, *De malefactoribus in parvis*, trespassers are mentioned who shall not yield themselves to the foresters, &c., but '*inmo malitiam suam proseguendo et continuando*,' shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent chapters) whether the act were done with or without just cause or excuse; so that it has been suggested (Chapple, J., MS. Sum.) that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense*. Malice, 'in its legal sense, denotes a wrongful act done intentionally without just cause or excuse.' Per Littledale, J. *M'Pherson v. Daniels*, 10 B. & C. 272, and approved by Cresswell, J., as the more intelligible expression in *R. v. Noon*, 6 Cox, C. C. 137. 'We must settle what is meant by the term malice. The legal import of this term differs from its acceptance in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to shew that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence,

when it is proved that the act of killing was intentional, and done without any justifiable cause.' Per Best, J. *R. v. Harvey*, 2 B. & C. 268.<sup>1</sup>

(j) 4 Blac. Com. 201. In *R. v. Greenacre*, 8 C. & P. 35. Tindal, C. J., said, 'where it appears that one person's death has been occasioned by the hand of another, it behoves that other to shew from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, or does not amount to the crime of murder.' Coleridge and Coltman, JJ., *presentibus*.

(k) Fost. 255. 4 Blac. Com. 201. 1 East, P. C. c. 5, s. 12, p. 224. On an indictment for murder it appeared that the deceased died of a wound inflicted in her chest with a knife; there was no evidence of any dispute; the prisoner asserted that she had killed herself, and this was his defence. The jury found the prisoner guilty, 'but we believe it was done without premeditation.' Byles, J., refused to receive this verdict, and told the jury that 'to reduce the crime to manslaughter, it must be shewn that there was provocation at the time, and provocation of a serious nature. The prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes malice; and although that may be rebutted by evidence, no such attempt has been made here. The defence is that the woman took her own life. The question for you is, did the prisoner take his wife's life, or not? If he did, it was murder.' *R. v. Maloney*, 9 Cox, C. C. 6.

#### AMERICAN NOTES.

<sup>1</sup> In Texas, malice was defined to be "a condition of mind which shews a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken." *Harris v. S.*, 8 Tex. Ap. 90, 109. *M'Kenney v. S.*, 8 Tex. Ap. 626. But the present Texas code defines malice to be any act done wilfully and purposely to the injury of another; and in Massachusetts it seems to mean something more—something in the nature of malevolence seems to be required.

*Bishop*, i. s. 429. See *Jones v. C.*, 75 Pa. 403. *Atkinson v. S.*, 20 Tex. 522.

<sup>2</sup> This is so also in America. See *C. v. York*, 9 Metc. 93. *S. v. Johnson*, 3 Jones (Law), 266. *Green v. S.*, 28 Miss. 687. *P. v. March*, 6 Cal. 543. *Green v. S.*, 13 Mo. 382. *S. v. Smith*, 2 Strobb. 77. *U. S. v. M'Ghee*, 1 Curtis, C. C. 1. *C. v. Vaughan*, 9 Cush. 594. *C. v. Macloon*, 101 Mass. 1. *P. v. Kirby*, 2 Parker, C. R. 23. *U. S. v. Mingo*, 2 Curtis, C. C. 1. *S. v. Willis*, 63 N. C. 26.

*express malice*; so that if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that he will have his blood, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of such express malice, have imputed the act to unadvised passion. (*l*) But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B., and they are reconciled again, and then, upon a new and sudden falling out, A. kills B., this is not murder. (*m*) It is not to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact: (*n*) but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder. (*o*)

Where knowledge of some fact is necessary to make a killing murder, those of a party who have the knowledge will be guilty of murder, and those who have it not of manslaughter only. If A. assault B. of malice, and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (*p*)

**Petit treason.**—By 24 & 25 Vict. c. 100, s. 8, every offence which before the commencement of the Act of the 9 Geo. 4, c. 31, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder. (*q*)

(*l*) 1 East, P. C. c. 5, s. 12, p. 224.

(*m*) 1 Hale, 451.

(*n*) 1 Hawk. P. C. c. 31, s. 30.

(*o*) 1 Hale, 451.

(*p*) 1 Hale, 446. Plowd. 100, *post*, p. 67.

(*q*) This clause is taken from the 9 Geo. 4, c. 31, s. 2; and 10 Geo. 4, c. 34, s. 3 (1.) Petit Treason was a breach of the lower allegiance of private and domestic faith; and considered as proceeding from the same principle of treachery in private life as would have led the person harbouring it to have conspired in public against his liege lord and sovereign. At common law the instances of this kind of crime were somewhat numerous and involved in some uncertainty. 1 Hale, 376; but, by the 25 Edw. 3, st. 5, c. 2, they were reduced to the following cases:—1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where an ecclesiastical person, secular or regular, killed his superior,

to whom he owed faith and obedience. The principles relating to wilful murder were also applicable to the crime of petit treason, which, though it appears to have been sometimes regarded differently, [by unwary people, as Foster, J., says, *Fost.* 323] was substantially the same offence as murder, differing only in degree. [*Fost.* 323, 327, 336. 4 Blac. Com. 203.] It was murder aggravated by the circumstances of the allegiance, however low, which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, and of that alone, the judgment upon a conviction was more grievous in one case than in the other; though in common practice no material difference was made in the manner of the execution. As the offence of petit treason is now rendered the same as murder, the course is always to indict for murder, and it has therefore been thought unnecessary to reprint the chapter on Petit Treason, which was in former editions. C. S. G.

## SEC. II.

*The Party Killing, and the Party Killed.*

**The party killing.**—The person committing the crime must be a free agent, and not subject to actual force at the time the fact is done: thus if A. by force take the arm of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but not B. But if it be only a moral force put upon B., as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. (r) If, however, A. procures B., an idiot, or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. (s) So if A. lay a trap or pitfall for B., whereby B. is killed, A. is guilty of the murder as a principal in the first degree, the trap or pitfall being only the instrument of death. (t) If one persuade another to kill himself, the adviser is guilty of murder; (u) and if the party takes poison himself by the persuasion of another, in the absence of the persuader, yet it is a killing by the persuader; and he is principal in it, though absent at the taking of the poison. (v)<sup>1</sup> And he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. (w)

A girl of thirteen years of age was indicted for the murder of an infant ten weeks old. On the prisoner's behalf it was urged that it was not proved that she had capacity to commit the crime, or had acted with deliberate malice: per Pollock, C. B., 'The crimes of murder and manslaughter are, in some instances, very difficult of distinction. The distinction which seems most reasonable consists in the consciousness that the act done was one which would be likely to cause death. No one could commit murder without that consciousness. The jury must be satisfied before they could find the prisoner guilty [of murder] that she was conscious, and that her act was deliberate. They must be satisfied that she had arrived at that maturity of intellect which was a necessary condition of the crime charged.' (x)

**The party killed.**—Murder may be committed upon any person within the King's peace. Therefore, to kill an alien enemy within

(r) 1 Hale, 483. Dalt. c. 145, p. 473.  
1 East, P. C. c. 5, s. 12, p. 225.

(s) 1 East, P. C. c. 5, s. 14, p. 228.  
1 Hawk. P. C. c. 81, s. 7.

(t) 4 Blac. Com. 35.

(u) If present when he kills himself; but if absent, he is an accessory before the fact. See *R. v. Russell*, R. & M. C. C. R. 356. C. S. G.

(v) 1 Hale, 481. Vaux's case, 4 Rep. 44 b. Provided the party taking knew not that it was poison. C. S. G.

(w) 1 Hawk. P. C. c. 27, s. 6. Sawyer's case, Old Bailey, May, 1815. MS. S. P. And see *R. v. Dyson*, *post*, p. 10.

(x) *R. v. Vamplew*, 3 F. & F. 520. Verdict, manslaughter.

## AMERICAN NOTE.

<sup>1</sup> See *C. v. Bowen*, 13 Mass. 356. *Brennan v. P.*, 15 Ill. 511. *Blackburn v. S.*, 23 Ohio St. 146.

the kingdom, unless it be in the heat and actual exercise of war, (y) is as much murder as to kill the most regular born Englishman. (z)<sup>1</sup>

An infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder: and therefore if a woman being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter. (a) But by statute any person unlawfully administering poison, or other noxious thing, to procure the miscarriage of any woman, or unlawfully using any instrument or other means whatsoever with the like intent, is guilty of felony. (b)

Where a child, having been born alive, afterwards died by reason of any potions or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them. (c) A prisoner was indicted for the manslaughter of an infant child; the prisoner, who practised midwifery, was called in to attend a woman who was taken in labour, and when the head of the child became visible, the prisoner, being grossly ignorant of the art which he professed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born: it was submitted that the indictment was misconceived, though the facts would warrant an indictment in another form; that the child being *en ventre sa mere* at the time the wound was given, the prisoner could not be guilty of manslaughter; but, the prisoner having been found guilty, the judges, upon a case reserved, were unanimously of opinion that the conviction was right. (d)

Upon an indictment against Ann West for murder of her child, Maule, J., told the jury that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby into a situation in which it cannot live, is guilty of murder. (e)

The murder of bastard children by the mother was considered as a crime so difficult to be proved, that a special legislative provision was made for its detection by the 21 Jac. 1, c. 27, which required that any

(y) 1 Hale, 433.

(z) 4 Blac. Com. 198. Formerly to kill one attaint in a *præmunire* was held not homicide, 24 Hen. 1, B. Coron. 197; but the 5 Eliz. c. 1, declared it to be unlawful.

(a) 1 Hale, 433.

(b) 24 & 25 Vict. c. 100, s. 58.

(c) 3 Inst. 50. 1 Hawk. P. C. c. 31, s. 16. 4 Blac. Com. 198. 1 East, P. C. c. 5, s. 14, p. 228; *contra*, 1 Hale, 432,

and Staund. 21; but the reason on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established. See Exod. c. 21, v. 22, 23.

(d) R. v. Senior, R. & M. C. C. R. 346.

(e) R. v. West, 2 C. & K. 784.

#### AMERICAN NOTE.

<sup>1</sup> As to killing an Indian; see S. v. Gut, 13 Minn. 341. Jim v. T., 1 Wash. Terr. 76.

such mother endeavouring to conceal the death of the child, should prove, by one witness at least, that the child was actually born dead. But this law was accounted a severe one, and was repealed, together with an Irish Act upon the same subject, by the 43 Geo. 3, c. 58.

Questions of considerable nicety sometimes arise on trials for infanticide, as to whether the death took place after the child was actually born, or whilst it was in the progress of being born; and the law is clear that a child must be actually born to be the subject of murder. On an indictment against a mother for the murder of her child, Littledale, J., told the jury, 'the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respire in the progress of the birth.' (f)

So where, upon an indictment containing a count for murder by stabbing, and a count charging that before the child was completely born the prisoner stabbed it with a fork, and that it was born, and then died of the stab, it was proved that a puncture was found on the child's skull, but when that injury was inflicted did not appear, and some questions were asked as to whether the child had breathed; Parke, J., said, 'The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder; there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose.' (g)

Where one count charged that the prisoner, being big with a female child, 'did bring forth the same alive,' and then in the usual manner alleged the murder of the child by choking it with a handkerchief; and another count charged the murder in the same way of a certain illegitimate child, 'then lately before born of the body' of M. T.; and there was strong evidence to prove that the child had been wholly produced alive from the prisoner's body, and that she had strangled it; but it was also clearly proved by the surgeon, who examined the body of the child, that it must have been strangled before it had been separated from the mother by the severance of the umbilical cord, and the surgeon further stated that a child has, after breathing fully, an independent circulation of its own, even while still attached to the mother by the umbilical cord, and that in his judgment the child in question had breathed fully after it had been wholly produced, and had therefore an independent circulation of its own before and at the time it was strangled, and was then in a state to carry on a separate existence. Erskine, J., directed the jury, that if they were satisfied that the child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully strangled the child after it had been so produced and while it was alive, and while it had, according to the evidence of the surgeon, an independent circulation of its own, he was of opinion that the charge in the said counts was made out, although the child, at the time it was so strangled, still remained attached to the mother by the navel-string. The jury found the prisoner guilty; and, upon a case reserved, the judges held the conviction right. (h) But if a child be actually wholly produced

(f) *R. v. Poulton*, 5 C. & P. 329.

(h) *R. v. Trilloe*, 2 M. C. C. R. 260. C.

(g) *R. v. Enock*, 5 C. & P. 539. *R. v. & Mars*, 650. *R. v. Crutchley*, 7 C. & P. Wright, 9 C. & P. 754, Gurney, B. S. P. 814. *R. v. Reeves*, 9 C. & P. 25. *R. v.*

alive, it is not necessary that it should have breathed to make it the subject of murder. (i)

### SEC. III.

#### *Felo de se.*<sup>1</sup>

*Self-murder* may be mentioned as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death. (ii) It has been already stated, that a person killing another, upon his desire or command, is guilty of murder, (k) but in this case the person killed is not looked upon as a *felo de se*, inasmuch as his assent, being against the laws of God and man, was void. (l) But where two persons agree to die together, and one of them, at the persuasion of the other, buys poison and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner. (m) Upon a principle which will presently be mentioned more fully, if a man, attempting to kill another, miss his blow and kill himself, (n) or intending to shoot at another, mortally wound himself by the bursting of the gun, (o) he is *felo de se*; his own death being the consequence of an unlawful malicious act towards another. It has also been said that if A. strike B. to the ground, and B. draw a knife and hold it up in his own defence, and A. in haste falling upon B. to kill him, fall upon the knife, and be thereby killed, A. is *felo de se*; (p) but this has been doubted. (q) A

Sellis, 7 C. & P. 850, where, per Coltman, J., the fact of the child having breathed is not a decisive proof that it was born alive: it may have breathed, and yet died before birth. *R. v. Sellis*, 7 C. & P. 850. *R. v. Handley*, 13 Cox, C. C. 79.

(i) *R. v. Brain*, 6 C. & P. 349.

(ii) 4 Blac. Com. 189; *Hales v. Pettite*, Plowd. 261 (b). See 45 & 46 Vict. c. 19, as to the interment of persons found *felo de se*.

(k) *Ante*, p. 5.

(l) 1 Hawk. P. C. c. 27, s. 6. An attempt to commit suicide is a misdemeanor at common law, and the question for the jury is whether the prisoner had a mind capable of contemplating the act, and whether in fact he did intend to take away his life, and drunkenness in this, as in other

cases, is no excuse; but it is a material fact in order to determine whether the prisoner really intended to kill himself. *R. v. Doody*, 6 Cox, C. C. 463. *Wightman, J.*

(m) 1 Hawk. P. C. c. 27, s. 6. *Keilw.* 136. *Moor*, 754.

(n) 1 Hale, 412.

(o) 1 Hawk. P. C. c. 27, s. 4.

(p) 3 Inst. 54. *Dalt.* c. 144.

(q) See 1 Hale, 412, who considers that in this case B. is not guilty at all of the death of A., not even *se defendendo*, as he did not strike, only held up the knife; and that A. is not a *felo de se*, but that it is homicide by misadventure. In Hawk. P. C. c. 27, s. 6, it seems to be considered that B. should be adjudged to kill A. *se defendendo*.

#### AMERICAN NOTE.

<sup>1</sup> In New York actual suicide is no offence, but attempting it is a felony. *Bishop*, ii. s. 1187 (10), citing *Darrow v. Family Fund Soc.*, 116 N. Y. 537. *Meacham v. New York Benevolent Ass.*, 120 N. Y. 237. *Freeman v. Nat. Ben. Soc.*, 42 Hun, 252. In Missouri "deliberately assisting"

in a suicide is manslaughter in the first degree. *S. v. Ludwig*, 70 Mo. 412. In Massachusetts self-murder, it seems, is no offence, and attempting to commit it is no offence. See *Bishop*, ii. s. 1187 (12). *C. v. Dennis*, 105 Mass. 162. *C. v. Mink*, 123 Mass. 422.

husband and wife being in extreme poverty and great distress of mind, the husband said, 'I am weary of life, and will destroy myself,' upon which the wife replied, 'If you do I will too.' The man bought some poison, mixed it with some drink, and they both partook of it. The husband died, but the wife, by drinking salad oil, which caused sickness, recovered, and was tried for the murder of her husband, and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced a verdict of not guilty. (r)

The prisoner was indicted for the murder of a woman by drowning her. It appeared that the prisoner had cohabited with the deceased for several months previous to her death, and she was with child by him; they were in a state of extreme distress; and being unable to pay for their lodgings, they quitted them in the evening of the night on which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to Westminster Bridge to drown themselves in the Thames; they got into a boat, and from that into another boat, the water where the first boat was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water; but whether by actually throwing of himself in, or by accident, did not appear. He struggled to get back into the boat again, and then found that the woman was gone; he then endeavoured to save her, but could not get to her, and she was drowned. In his statement before the magistrate he said that he intended to drown himself, but dissuaded the woman from following his example. The learned judge told the jury, that if they believed that the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner; but that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the commission of a felonious act, and the survivor was guilty of murder. He also told the jury, that although the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated that they were of opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. And, upon a case reserved, the judges were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal

(r) Anonymous case, as stated by Paterson, J., in *R. v. Alison*, 8 C. & P. 418. The case is reported in *Moor*, 754. *Quære*, whether they were husband and wife; the report begins, '*home et se femme ayant longs*

*temps vive incontinent ensemble.*' And it states that a special verdict was found, but does not state the decision. See my note, vol. i. p. 146, as to the decision of this case. C. S. G.

in the second degree, and was guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either of them, and the prisoner was recommended for a pardon. (s) So where upon an indictment for the murder of a woman, it appeared that the prisoner and the deceased, who passed as husband and wife, being in very great distress, both agreed to take poison, and each took a quantity of laudanum, in the presence of the other, and both lay down on the same bed together, wishing to die in each other's arms, and the woman died, but the prisoner recovered; Patteson, J., told the jury that, 'supposing the parties in this case mutually agreed to commit suicide, and one only accomplished that object, the survivor will be guilty of murder in point of law.' (t)

A person could not formerly be tried as an accessory before the fact, for inciting another to commit suicide, if that person committed suicide. (u) But the 24 & 25 Vict. c. 94, s. 1, seems to remove this difficulty.

#### SEC. IV.

##### *Of the means of killing; and of causing death by malicious and intentional neglect of duty. (v)*

The killing may be effected by poisoning, (w) striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. (ww) But there must be some external violence, or *corporal* damage, to the party; and therefore where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice. (x) If a man, however, does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended: (xx) as where a person carried his sick father, against his

(s) *R. v. Dyson*, R. & R. 523.<sup>1</sup>

(t) *R. v. Alison*, 8 C. & P. 418, Patteson, J. *R. v. Jessop*, 16 Cox, C. C. 204.<sup>2</sup>

(u) *R. v. Russell*, R. & M. C. C. R. 356. *R. v. Leddington*, 9 C. & P. 79. Alderson, B.

(v) For cases of manslaughter by neglect of duty see *post*, 183.

(w) See 11 Co. 32 a; Kel. 32, 125; Post. 68, 69; 1 East, P. C. c. 5, s. 12<sup>3</sup>

p. 225, s. 30, p. 251; 1 Hale, 455; 9 G. 4, c. 31; Barr. Obs. on Stat. 524.

(ww) 4 Blac. Com. 196, *moriendi mille figura*, 1 Hale, 431. 1 Hawk. P. C. c. 31, s. 4.

(x) 1 Hale, 427, 429. 1 East, P. C. c. 5, s. 13, p. 225. *R. v. Murton*, 3 F. & F. 492. Byles, J.

(xx) 4 Blac. Com. 197.

#### AMERICAN NOTES.

<sup>1</sup> This seems to be so also in America. See *Blackburn v. S.*, 23 Ohio St. 146, and *C. v. Bowen*, 13 Mass. 356; 7 Am. D. 154, a case where one of two prisoners in adjoining cells advised the other to commit suicide, which he did.

<sup>2</sup> If the adviser were absent (the person who committed suicide committing self-murder) he would only be an accessory before the fact, and as he could not be indicted

except with, or after, his principal, he could not be indicted at all except for 24 & 25 Vict. c. 94, s. 1. In America he probably could be sued because he would be the principal. See Bishop, i. ss. 652, 670; ii. s. 1187 (5). One who in attempting to take his own life accidentally kills another who endeavours to stop him commits manslaughter. *C. v. Mink*, 123 Mass. 422.



will, in a severe season, from one town to another, by reason whereof he died; (y) or where a harlot being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite; (z) or where a child was placed in a hogsty, where it was devoured. (a) In these cases, and also where a child was shifted by parish officers from parish to parish, till it died for want of care and sustenance, (b) it was considered that the acts so done, wilfully and deliberately, were of malice prepense. (c)<sup>1</sup>

**By neglect of duty.** — Where the prisoner had delivered herself by night upon a turnpike road, and, after carrying her child more than a mile along the road, had left it on the side of the road without any clothing or covering to protect it from the inclemency of the weather, where it died from the cold, and she had wholly concealed the birth of the child till she was apprehended; *Coltman, J.*, in summing up, said, 'If a party so conduct himself with regard to a human being, which is helpless and unable to provide for itself, as must necessarily lead to its death, the crime amounts to murder. But if the circumstances are not such that he must have been aware that the result would be death, the crime would be manslaughter, provided the death were caused by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held that persons leaving a child exposed, and without any assistance, and under circumstances where no assistance was likely to be rendered, were guilty of murder. It will be for you to consider whether the prisoner left the child in such a situation that to all reasonable apprehension she must have been aware that the child must die, or whether there were circumstances that would raise a reasonable expectation that the child would be found by some one else, and preserved; because then it would only be the crime of manslaughter. If a person were to leave a child at the door of a gentleman, the probability would be so great that it would be found, that it would be too much to say that it was murder, if it died: if, on the other hand, a child were left in an unfrequented place, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, and therefore it is for you to say whether the prisoner had reasonable ground for believing that the child would be found and preserved. (d)

(y) 1 Hawk. P. C. c. 31, s. 5. 1 Hale, 431. 432.

(z) 1 Hale, 431. 1 Hawk. P. C. c. 31, s. 6.

(a) 1 East, P. C. c. 5, s. 13, p. 226.

(b) Palm. 545.

(c) See case of frightening a child, *post*, p. 178.

(d) *R. v. Walters, C. & M.* 164, and *MS. C. S. G.* See *Stockdale's case*, 2 Lewin, 220. In one case a prisoner was convicted of manslaughter for assaulting her infant

female child, and throwing it upon a heap of dust and ashes, and leaving it there exposed to the cold air, by means of which exposure the child became frozen and died. *R. v. Waters*, 1 Den. C. C. 356. 2 C. & K. 864. The point in this case was, that it was consistent with all that was stated in the count that the child might be capable of taking care of itself; but it was held that if she had been sufficiently old, or strong enough so to do, the death could not have arisen from the act of the prisoner, and

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<sup>1</sup> So where the master of a ship compelled a seaman who was in a very weak state to ascend the rigging, and he fell and was killed,

it was held in America that this might be murder. *U. S. v. Freeman*, 4 Mason, 505. See *C. v. Fox*, 7 Gray (Mass.), 505.

The indictment charged first that the prisoner killed his wife by beating; secondly, by throwing her out of the window; and, thirdly and fourthly, that he beat her and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and the bruises received by the fall died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall: but Heath, Gibbs, and Bayley, JJ., were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner however was acquitted; the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats. (*f*)

Upon a trial for manslaughter it appeared that the prisoner and the deceased had some dispute about paying for some spirits, and the first witness swore that the deceased's boat being alongside the schooner in which the prisoner was, the prisoner pushed it with his foot, and the deceased stretched out over the bow of the boat, to lay hold of a barge, to prevent the boat drifting away, and losing his balance fell overboard, and was drowned. J. A. Park, J., after consulting Patteson, J., said, that they were of opinion that, if the case had rested on the evidence of the first witness, it would not have amounted to a case of manslaughter. (*h*) So where upon an indictment for murder by drowning, by the deceased slipping into the water in endeavoring to escape from an assault made with intent to murder or rob, it appeared that the body was found in a river, and it bore marks of violence, but not sufficient to occasion death, which appeared to have been caused by drowning, and there were marks of a struggle on the bank of the river; Erskine, J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or the mind; and it then became the guilty act of him who compelled the deceased to

therefore the defect was cured by the verdict. It is a novel doctrine in criminal cases that a defective indictment is cured by verdict. Lord Hale says, 'None of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.' 2 Hale, P. C. 193; and no authority is known for such a doctrine in other cases. The indictment was right; for it alleged the acts of the prisoner which caused the death, and that is all that it ever was necessary to do in such an indictment. C. S. G.

(*f*) *R. v. Evans*, O. B. Sept. 1812. MS. Bayley, J. Where an indictment for manslaughter alleged that the deceased was riding on horseback, and that the prisoner

assaulted and struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, whereby it became frightened, and threw the deceased, &c., and it was proved that the prisoner struck the deceased with a small stick, and that he rode away, the prisoner riding after him, and on the deceased spurring his horse, it winced and threw him; it was held, on the authority of the above case, that the case was proved. *R. v. Hickman*, 5 C. & P. 151, J. A. Park, J.

(*h*) *R. v. Waters*, 6 C. & P. 328, J. A. Park and Patteson, JJ. It afterwards appeared that the prisoner was not the man who pushed the boat away.

take the step. But the apprehension must be of immediate violence, and well grounded from the circumstances by which the deceased was surrounded; not that the jury must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take. (i)

Where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for his misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; not having suffered him to lie in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice, in the opinion of the medical witnesses, was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home; and they inclined to think that, if he had been properly treated when he came home, he might have recovered; the Court, under these circumstances, and others in favour of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill-treatment he received from his master after returning from Bridewell, and whether that ill-treatment amounted to evidence of malice; in which case they were to find him guilty of murder. (j) The prisoner Charles Squire, and his wife, were indicted for the murder of a boy who was bound as a parish apprentice to the prisoner Charles; and it appeared that both the prisoners had used the apprentice in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment: but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received. Lawrence, J., was of the opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed. (k)

(i) *R. v. Pitts, C. & Mars*. 284.<sup>1</sup>

(j) *Self's case*, 1 East, P. C. c. 5, s. 13, p. 226, 7. 1 Leach, 137, and see the case more fully stated, *post*, p. 138.

(k) *R. v. Squire and his wife*, Stafford Lent Assizes, 1799, MS.; and as to the principles upon which the wife was acquitted, see the case more fully stated, vol. i. p. 151. After the surgeon had deposed that the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received, the learned judge was proceeding to inquire of him whether, in his judgment, the series of cruel usage the boy had received, and in which the wife had been as active as her husband, might not have so far broken his

constitution as to promote the debility, and cooperate along with the want of proper food and nourishment to bring on his death, when the surgeon was seized with a fainting fit, and, being taken out of court, did not recover sufficiently to attend again upon the trial. The judge, after observing that, upon the evidence, as it then stood, he could not leave it to the jury to consider, whether the wounds, &c., inflicted on the boy, had contributed to cause his death, said, that if any physician or surgeon were present who had heard the trial, he might be examined as to the point intended to be inquired into; but no such person being present, he delivered his opinion to the jury, as stated in the text.

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<sup>1</sup> As to the exercise of influence upon the mind of another, causing him to so act as to produce injury to himself or a third person, see *Bishop*, i. ss. 560-563. *Wharton*

on Homicide, ss. 368-372. *Hendrickson v. C.*, 85 Ky. 281. *C. v. Webster*, 5 Cush. (Mass.) 295.

The prisoner was indicted for the manslaughter of his apprentice by neglecting to provide him sufficient meat and drink, &c. The deceased was bound to the prisoner by indenture, by which he covenanted to find him clothes and victuals; his death was produced, according to the evidence of some medical men, by uncleanness and want of food; Patteson, J., told the jury that, 'by the general law a master was not bound to provide medical advice for his servant; (l) yet that the case was different with respect to an apprentice, and that a master was bound during the illness of his apprentice to provide him with proper medicines; and that if they thought that the death of the deceased was occasioned, not by the want of food, &c., but by want of medicines, then, in the absence of any charge to that effect in the indictment, the prisoner would be entitled to be acquitted.' (m) An indictment for manslaughter in one count alleged that the deceased was the apprentice of the prisoner, and that it was his duty to provide sufficient food for her as such apprentice, and that he neglected to do so, &c., by means of which she died; in another count it alleged that the deceased was the servant of the prisoner, and that it was his duty to provide her with food, &c. An invalid indenture of apprenticeship was put in, and it appeared that the deceased had always been treated as an apprentice by the prisoner, and had performed such duties as an apprentice would have performed, but the prisoner being a farmer these duties were the same as those performed by ordinary farmers' servants; it was objected that the first count was not proved, as the indenture was invalid; and that the relation of master and servant never existed, for an invalid contract of apprenticeship could not be converted into a hiring and service; that the foundation of this indictment was that the prisoner was legally bound to provide maintenance for the deceased, and here it was clear he could neither have been compelled to support her as an apprentice or as a servant; but it was held, that the prisoner, having treated the deceased as his servant, could not turn round and say she was not his servant at all. (n) Where the first count stated that the deceased was the apprentice of the prisoner, and it was his duty to provide the deceased with proper and necessary nourishment, medicine, medical care and attention, and charged the death to be from neglect, &c.; and the second count charged that the deceased 'so being such apprentice as aforesaid,' was killed by the prisoner by over-work and beating; and the only evidence given to shew that the deceased was an apprentice was, that the prisoner had stated that he was his apprentice; Patteson, J., held that there was sufficient evidence to support the second count, but not the first. (o)

(l) See *Sellen v. Norman*, 4 C. & P. 80.

(m) *R. v. Smith*, 8 C. & P. 135. See 38 & 39 Vict. c. 86, s. 6, noticed vol. i., *Conspiracy*.

(n) *R. v. Davies*, Hereford Summer Assizes, 1831, Patteson, J. MS. C. S. G. In support of this decision it may be observed, that although a son could not be punished for the murder of his father as for petit treason, under the 25 Edw. 3, s. 5, c. 2, unless by a reasonable construction he came under the word servant. Yet if he

were bound apprentice to his father or mother, or was maintained by them, or did any necessary service for them, though he did not receive wages, he might have been indicted by the description of servant. 1 Hawk. P. C. c. 32, s. 2. 1 East, P. C. c. 5, s. 99, p. 336; and a near relation, as a sister, might be a servant within the statute, if she acted as such. *R. v. Edwards*, Stafford Assizes. MS. coram Lawrence, J. C. S. G.

(o) *R. v. Crumpton*, C. & Mars. 597.

If a mistress culpably neglects to supply proper food and lodging to her servant, at a time when the servant is reduced to such an enfeebled state of body or mind as to be helpless and unable to take care of herself, or is so under the dominion and restraint of the mistress as to be unable to withdraw herself from her control; and the death of the servant is caused or accelerated by such neglect, the mistress is liable to be convicted of manslaughter. (*p*)

The prisoner, who was the wife of J. S., was charged with the murder of her illegitimate child, aged three years, by omitting to give it proper food. The prisoner had in December, 1834, married J. S.; the deceased was her illegitimate child, and was born before her marriage; in the judgment of medical witnesses the death had proceeded from the want of proper food. For the prosecution *R. v. Squire*, (*q*) and the 4 & 5 Will. 4, c. 76, (the Poor Law Act) s. 71, were referred to; and it was submitted that the mother of an illegitimate child was bound to take care of her child, and might be guilty of murder if its death arose from neglect. Alderson, B.: 'The prisoner is indicted as a married woman: if her husband supplied her with food for this child, and she wilfully neglected to give it to the child, and thereby caused its death, it might be murder in her. (*r*) In these cases the wife is in the nature of the servant of the husband: it does not at all turn upon the natural relation of mother: to charge her you must shew that the husband supplied her with food to give to the child, and that she wilfully neglected to give it. There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, and, according to the case before Mr. Justice Lawrence, (*q*) can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband. The omission to provide food is the omission of the husband, and the crime of the wife can only be the omitting to deliver the food to the child after the husband has provided it.' (*t*)

(*p*) *R. v. Smith*, 34 L. J. M. C. 53; *et per* Erle, C. J. 'It is undisputed law that if a person who has the custody of another who is helpless, leaves that other with insufficient food, and so causes his death, he is criminally responsible. But it is also clear that if a person having the exercise of free will, chooses to stay in a place where he receives insufficient food, and his health is injured, and death supervenes, the master is not criminally responsible.' The facts of this case would have supported an indictment on the 24 & 25 Vict. c. 100, s. 26, *post*, in this vol. But that clause was not adverted to in the case; and yet it seems very well worthy of consideration whether, where death results from the commission of an offence within that section, the case is not one of manslaughter.

(*q*) *Supra*, note (*k*), p. 13.

(*r*) This position was thought too wide in *R. v. Bubb*, *infra*, by Williams, J., as it is not limited to cases where death or serious bodily injury is contemplated. C. S. G.

(*t*) *R. v. Saunders*, 7 C. & P. 277. This

case was decided on the opening of counsel, and it did not appear whether the wife was living with her husband, or whether he was capable of maintaining the child. By the 4 & 5 Will. 4, c. 76, s. 71, the mother of every child born a bastard after the passing of the Act, 'so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family, until such child shall attain the age of sixteen.' By sec. 57, every man who, after the passing of the Act, marries a woman having a child or children, either legitimate or illegitimate, 'shall be liable to maintain such child or children as a part of his family' until sixteen, or until the death of the mother. In *Laing v. Spicer*, Tyrw. & Gr. 358, 1 M. & W. 129, it was held that the putative father of a bastard, on whom an order of maintenance had been made, under the 18 Eliz. c. 2, s. 2, and 49 Geo. 3, c. 68, before the passing of the 4 & 5 Will. 4, was no longer liable under such order, where the mother since the passing of that Act had married a person capable of sup-

An indictment for murder alleged that M. Hook, an infant of tender age, was a daughter of R. Hook, and was living with R. Hook and Elizabeth Bubb, and under their care and control, and unable to provide for or take care of herself, and that it was the duty of the prisoners to provide for and administer to M. Hook sufficient food for the support of her body, and that the prisoners feloniously, &c., did refuse and neglect to give and administer to M. Hook sufficient food for the support of her body; whereby she became mortally sick and died. (u) The case against Bubb was, that she was the sister of Hook's deceased wife, and on her death had gone to live with Hook,

porting the child; and the Court seemed to think that the putative father would not be liable, even if the husband were incapable of supporting the child. It seems to follow, from this decision, and from the words of sec. 71, that the liability of the mother of a bastard under that Act wholly ceases upon her marriage; and it is presumed that it was upon this ground that *R. v. Saunders* was decided. No notice was taken in that case of any common-law liability to support a bastard. In 1 Blac. Com. 457, it is said, 'the duty of parents to their bastard children by our law is principally that of maintenance; for though bastards are not looked upon to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved; and they hold, indeed, as to many other intentions; as particularly that a man shall not marry his bastard sister or daughter,' (citing *Hains v. Jeffell*, 1 Lord Raym. 68. Comb. 356). And this is in accordance with Puffendorf, book 4, c. 11, s. 6, who says, 'maintenance is due not to legitimate children alone, but to natural and even to incestuous issue.' In *Nichole v. Allen*, 3 C. & P. 36, Lord Tenterden, C. J., held that there was not only a moral but a legal obligation on a putative father to maintain his bastard child; and though this case seems to be overruled by *Mortimore v. Wright*, 6 M. & W. 482, as to there being no necessity for a promise on the part of the father to pay for the maintenance of the child; this point seems not to have been questioned. It seems, therefore, that there is this distinction between an apprenticeship and the bastard of the wife, that there is neither a moral nor a legal obligation on the wife to maintain an apprentice, but there certainly is a moral, and it should seem a legal obligation to support a bastard. In a note to *R. v. Saunders*, the reporters observe, 'an Act of parliament (18 Eliz. c. 3, s. 2) would hardly have been required to fix the mother with the payment of a weekly sum, if at common law she is liable for the entire maintenance of the child.' This observation might have been entitled to weight, if there had not been similar provisions to compel the maintenance of legitimate children. These statutes were probably introduced for the purpose of giving a ready means of enforcing a legal obligation,

by compelling the payment of a sufficient sum to indemnify the parish while the children were supported by it. With regard to legitimate children, it is the duty of their parents, by the common law, to provide for their maintenance. 1 Blac. Com. 446; see Puff. L. of N., book 4, c. 11, s. 4. This duty may be enforced, in the case of poor children, by the 43 Eliz. c. 2, s. 6, as well on the father as on the mother, being of sufficient ability. By the 5 Geo. 1, c. 8, if either father or mother leave their children a charge upon a parish, the goods of the father or mother may be seized and sold, and the rents of their lands received in discharge of the parish. And by the 5 Geo. 4, c. 83, s. 3, every person able, wholly or in part, to maintain himself, himself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, whereby any of his or her family becomes chargeable, is to be deemed an idle and disorderly person, and punished accordingly. It should seem that there may be cases where a wife may be liable to maintain her children during her husband's lifetime, as where the husband has deserted her, or she has a separate maintenance (see *Christian's note* to 1 Blac. Com. 448), and it may be worthy of consideration whether where the husband is incapable of work, but she is capable of maintaining her children, she is not legally bound so to do; and as the overseers of every parish are bound by law to provide necessary support in cases of emergency, it may well be doubted whether cases may not occur where the wife would be *legally bound* to apply for relief to the parish officers. Suppose a husband were ill in bed, but the wife well, and the children starving for want of food, could it be fairly contended that she was under no legal obligation to apply for relief for them, and that if one of them died for want of food, she was not criminally responsible? See *Urmonst v. Newcomen*, 4 A. & E. 899, and *R. v. Mabbett*, *post*, p. 19, C. S. G.

(u) The grand jury returned a bill for murder against E. Bubb, and for manslaughter against R. Hook, and a bill for manslaughter in the same form, *mutatis mutandis*, as the bill for murder was then preferred against the latter, and Bubb tried first.

and became the manager of his household. He was absent from home except from Saturday night until Monday morning, but always provided ample food for the whole family. Hook's children were healthy till Bubb undertook their management, but she systematically neglected them, especially the deceased, and, notwithstanding the remonstrances of the neighbours, persisted in withholding sufficient food, for want of which the child gradually wasted away, and died of actual starvation. Williams, J., told the jury that 'the indictment alleges, first, a duty on the part of the prisoner to supply the necessities of life to the child; it alleges, secondly, a malicious neglect or omission to perform that duty; and it alleges, thirdly, that the omission or neglect caused the death of the child. Now, first, with respect to the proposition that it was the duty of the prisoner to provide food necessary to sustain the life of the child. It is quite clear that the circumstance of the prisoner being aunt of the child, or being resident in the same house with the child, was not sufficient to cast upon her the duty of providing food for it. But if the prisoner undertook the charge of attending to the child, and of taking that care of it which its tender age required, a duty then arose to perform those duties properly; and if the prisoner, being in the capacity, as it were, of a servant or nurse, and having the charge of attending and taking care of the child, was furnished with the means of doing so properly, then the duty arose, which is charged in this indictment, of giving it sufficient food, and if the prisoner neglected to perform that duty, beyond all question she is criminally responsible. It remains for me to explain to what extent she is responsible. If the omission or neglect to perform the duty was malicious, then the indictment would be supported, and the crime of murder would be made out against the prisoner; but if the omission or neglect were simply culpable, but not arising from a malicious motive on the part of the prisoner, then it would be your duty to find her guilty of manslaughter only. And here it becomes necessary to explain what is meant by the expression malicious, which is thus used. If the omission to supply necessary food was accompanied with an intention to cause the death of the child, or to cause some serious bodily harm to it, then it would be malicious in the sense imputed to it by this indictment, and in a case of this kind it is difficult, if not impossible, to understand how a person who contemplated doing serious bodily injury to the child by the deprivation of food, could have meditated anything else than causing its death. You will, therefore, probably consider that the question resolves itself into this: Did the prisoner contemplate, by the course she pursued, the death of the child? If she did, and death was caused by the course she pursued, then she is guilty of murder. But if you are not satisfied that she contemplated the death of the child, then, although guilty of a culpable neglect of duty, it would amount only to the crime of manslaughter. If, on the other hand, you should think either that she did not undertake the duty of supplying the child with proper food, or that she did not culpably neglect that duty, then you will acquit her.' (v)

(v) *R. v. Bubb*, 4 Cox, C. C. 455. The indictment also alleged the duty to provide clothing and the neglect thereof; but as the child is alleged to have died of 'actual

On the trial of Hook for the manslaughter of the same child, in addition to the facts proved on the trial of Bubb, it was proved that when he was at home she treated the children better than on other occasions; and that he had uniformly behaved kindly to them, and especially to the deceased. Williams, J., told the jury that 'this case differs from the last in this very essential particular, that here there is a duty directly cast upon the prisoner to provide sufficient food for the child if he has sufficient means for doing so, and inasmuch as it is proved that the prisoner had such means, there can be no doubt but that the law threw upon him the duty of preserving the child's life by providing it with proper food. But the peculiarity of the case is this, that inasmuch as we must take it that Bubb was guilty, she could not have been so, unless the prisoner had provided her with sufficient means for feeding the child, and it must be taken as an admitted fact in this case that the prisoner did take such steps as but for Bubb's misconduct, would have preserved the child's life. Then the question is how is the charge shaped against the prisoner? If Bubb neglected her duty by depriving the child of food for any purpose, and the prisoner was conscious of it, and nevertheless chose to let her persevere in that course, he thus became himself an instrument, as it were, of depriving the child of sufficient food, and he would be guilty upon this indictment. If, therefore, you think he was conscious that Bubb deprived the child of food to such an extent as to render it dangerous to the child's life, and, being so conscious, instead of preventing her from continuing in this course, he allowed her to do so, and was culpably negligent of the obvious duty cast upon him, then he is guilty of manslaughter, because then substantially he would have neglected to provide the child with proper food.' (w)

Where parent, child, and servant reside in the same house, the duty of the parent is to provide food for the child, and the duty of the servant is to supply the food, when so provided by the parent, to the child, an indictment therefore charging both with the same duty cannot be supported; but there ought to be separate indictments charging each in respect of the duty incumbent on each. (x)

Upon an indictment against husband and wife for the murder of their infant child, it appeared that the child's death was produced by English cholera, and that insufficient food had a tendency to produce that complaint; the husband was in work, but he spent the money he obtained on himself; and the wife did not appear to have any money or food to give to the child: Martin, B., consulted Erle, J., and they were of opinion that it was the bounden duty of all persons having children, when they themselves cannot support them, to endeavour to obtain the means of getting them support, and if they

starvation' all relating to the clothing has been omitted. This and the next case underwent the most careful consideration, and the law on the subject was fully discussed between Williams, J., Lord Campbell, C. J., and the Editor, on a review of the previous cases. C. S. G. See *R. v. Conde*, 10 Cox, C. C. 547.

(w) *R. v. Hook*, 4 Cox, C. C. 455.

(x) This was agreed between Williams, J., and the Editor in *R. v. Bubb*, *supra*, on an indictment before the 14 & 15 Vict. c. 100. But *qu.*, whether one indictment in the present form would not suffice. C. S. G.



wilfully abstain from going to the union, where by law they have a right to support, and their children die in consequence; they are criminally responsible for it; but there ought to be a distinct abstaining to go for several days: and if a married woman neglects for four or five days to go to the union for the purpose of getting support for a child, she knowing that such neglect would be likely to produce the death of the child, it is manslaughter. (y)

But where a woman took charge of the illegitimate child of her dead daughter, and the child died for want of proper nourishment, Brett, J., told the jury that mere negligence would not be sufficient to convict the prisoner. There must be negligence so great that they must be of opinion that the prisoner was reckless whether the child died or not. Her omission to send the child to the workhouse would not be sufficient. The question was whether she was wickedly careless. She might have been very careless, and ought to have done more than she did, but the case must be judged according to the state and condition of life of the prisoner, and the jury must say whether she had let the child die by *wicked* negligence or not. (yy)

By the 31 & 32 Vict. c. 122, s. 37, when any parent shall wilfully neglect to provide medical aid for his child, being in his custody and under the age of fourteen years, whereby the health of such child shall be seriously injured, he is guilty of an offence punishable summarily before justices. (z) Since that statute, if from a conscientious religious conviction that in answer to prayer God would heal the sick, and in obedience to the tenets of a sect called the Peculiar People, and not from any intention to avoid the performance of his duty to his child or to break the law, the parent of a sick child, being one of such sect, while furnishing it with all necessary food and nourishment, refuse to call in medical aid though well able to do so, and the child in the opinion of the jury die from not having such medical aid, it was held to be manslaughter. (zz) But in order to convict of manslaughter, it is necessary to prove that the neglect caused or accelerated the death. It is not enough that it might have done so. (a)

The prisoner was tried for the murder of her daughter: the case for the prosecution was that the prisoner, having great ill-will against the deceased, had purposely neglected to procure a midwife, or other proper person to attend her daughter when she was taken in labour, and that by reason thereof she died in childbirth; she was about eighteen years of age and unmarried. The prisoner had married a second husband, and after the marriage the daughter had lived with them for some time, and then went out to service, occasionally, returning to live with them when she was out of place; at last she

(y) R. v. Mabbett, 5 Cox, C. C. 339. See the latter part of note (t), *ante*, p. 16.

(yy) R. v. Nicholls, 13 Cox, C. C. 75.

(z) The section is repealed by the Prevention of Cruelty to Children Act, 1889, 52 & 53 Vict. c. 44.

(zz) R. v. Downes, 1 Q. B. D. 25. 13 Cox, C. C. 111. 45 L. J. M. C. 8; *et per* Bramwell, B. 'The statute referred to has imposed a positive and absolute duty, whatever the conscientious or superstitious opinions

of people may be, to provide medical aid for their children. It is found that the prisoner thought it was irreligious to do it, but the law does not allow him to break its provisions; he must obey it whatever his opinions about the law may be;' *et per* Mellor, J. 'The statute by "wilfully neglect" means intentionally, or purposely omit to call in medical aid.'

(a) R. v. Morby, 8 Q. B. D. 571.

returned to her step-father's house on a Tuesday, and continued there till the Saturday following, when she died. It was objected that the prisoner was under no legal obligation to procure or try to procure the attendance of a midwife. Williams, J., directed the jury to consider whether it was established by the evidence that the death was attributable to the prisoner's neglect to use ordinary diligence in procuring the assistance of a midwife, or other proper attendant, and if it was so established, then to consider whether by so neglecting she intended to bring about the death of her daughter; and if so, the jury were to convict her of murder; but if not, of manslaughter: the jury convicted her of manslaughter; and it was held that there was not an omission of any duty rendering the prisoner liable to be convicted. Assuming that if she had used ordinary care she would have procured the attendance of a midwife; that she knew where a midwife could be found; and that if the midwife had been summoned she would have attended; her skill must have been paid for, and there was no evidence that the prisoner had the means at her command of paying for that skill. The midwife would probably have attended without being paid. Yet the prisoner could not be criminally responsible for not asking for that aid, which, perhaps, might have been given without compensation. Aid of this kind was not always required in childbirth, and sometimes no ill consequences resulted from its absence. (*aa*)

Where on an indictment for murder of an infant it appeared that the infant was found dead in a bag without any preparation having been made for it by the prisoner, it was held that she was not guilty of manslaughter, although she knew she was about to be delivered, and wilfully abstained from taking the necessary precautions to preserve the life of the child after its birth, and the child died in consequence of that neglect. (*b*)

The prisoner was indicted for the manslaughter of her child, and it appeared that she had been delivered of the child whilst on the seat of a privy, and that the child had breathed. The prisoner was seventeen years old, subject to epileptic fits, and this was her first child. Erle, J., told the jury, 'The question in this case is, whether there was any negligence on the part of the mother in not providing for the safety of her offspring. It is but reasonable to presume that the child dropped from her whilst she was on the privy. Now, if you think that she had the means and the power of procuring such assistance as might have saved the life of the child, by neglecting to do so she would be clearly guilty of manslaughter. But it is proper that you should take into your consideration that the prisoner is very young; that this was her first child; that she was subject to epileptic fits, and that the probability is that the child could have survived but a very few moments after its immersion in the soil.' (*c*)

Where a child is very young and not weaned, the mother is

(*aa*) *R. v. Shepherd*, 1 L. & C. 147.

(*b*) *R. v. Knights*, 2 F. & F. 46. Cockburn, C. J., and Williams, J. But where a woman, in order to conceal her shame, delivered herself, and in consequence, by her

negligence, the child, after having a separate existence, died, Brett, J., ruled that she was guilty of manslaughter. *R. v. Handley*, 13 Cox, C. C. 79.

(*c*) *R. v. Middleship*, 5 Cox, C. C. 275.

criminally responsible if the death arose from her not suckling the child when she was capable of doing so. (d)

If a person, who stands in the place of a parent, inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies of a disease hastened by such ill-treatment, it will be murder if the treatment was of such a nature as to indicate malice: but if such person believed that the child was shamming illness, and was really able to do the work required, it will only be manslaughter although the punishment were violent and excessive. (e)

Where a party undertakes to provide necessaries for a person, who is so aged and infirm that he is incapable of doing so for himself, and through his neglect to perform his undertaking death ensues, he is criminally responsible; so also if a party confines another, he is bound to provide him with necessaries, and if he neglects so to do, and in consequence thereof the party dies, he is criminally responsible. Upon an indictment for murder, which stated that the deceased was of great age, and was residing in the house and under the care and control of the prisoner, and that it was his duty to take care of and find her sufficient meat, &c., and then alleged her death to have been caused by confining her against her will, and not providing her with meat and other necessaries; it appeared that she was seventy-four years of age, and that upon the death of her sister, with whom she had lived, the prisoner, who attended the funeral, took the deceased home with him, saying she was going home to live along with him till affairs were settled, and he would make her happy and comfortable; and on another occasion the prisoner had said that in consideration of a transaction, which he mentioned, he had undertaken to keep the deceased comfortable as long as she lived. When the deceased first went to the prisoner's a servant was kept, and the deceased lodged in the back parlour; afterwards she was removed into the kitchen. After some time no servant was kept, and the deceased was waited on by the prisoner and his wife, and she remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together; and on several occasions had complained of being confined; in the cold weather no fire was discernible in the kitchen, and for some time before her death the deceased was continually locked in the kitchen, and not out of it at all. An undertaker's man stated that, from the appearance of the body, he thought she had died from want and starvation. A surgeon proved that the immediate cause of death was water on the brain; that the appearance of all parts of the body betokened the want of proper food and nourishment, that there was great emaciation of the body, and that the water on the brain might have been produced by exhaustion. Patteson, J., 'If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of the deceased, then he will be guilty of murder; (f) if, however, you

(d) R. v. Edwards, 8 C. & P. 611, Patteson, J.

(e) R. v. Cheeseman, 7 C. & P. 455, Vaughan, J. See this case, *post*.

(f) This position is too narrow. If the

prisoner intends either death, or grievous injury to the health, or body of the party, it is murder; as Williams, J., and the Editor agreed in R. v. Bubb, *ante*, p. 171. C. S. G.

think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which she, from age and infirmity was incapable of doing.' (After reading the evidence as to the contract, the learned judge added), 'This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and though, if he broke that contract, he might not be liable to be indicted during her life, (g) yet if by his negligence her death was occasioned, then he becomes criminally responsible.' (h)

And where the prisoner, a woman of full age who had no means of her own, lived with and was maintained by her aged aunt, and the aunt being bed-ridden was unable to get food, although it was daily brought to the house and received by the prisoner, it was held that it was the duty of the prisoner to supply her aunt with sufficient food to maintain life; and the death of her aunt having been accelerated by neglect of this duty, she was properly convicted of manslaughter. (hh)

Upon an indictment for manslaughter it appeared that the prisoner four years previously had separated from his wife, by mutual consent, the prisoner allowing her 2s. 6d. a week, which had been in general regularly paid, and the last payment was on the Sunday preceding her death. On the Tuesday she was turned out of her lodgings, being at that time suffering from diarrhoea. On the Wednesday she was in a house in a state of great illness, when the prisoner passed by, and was told he must take his wife away, as she could not shelter there. The prisoner replied, 'Turn her out; I won't be pestered with her,' and then walked away. The same evening, which was wet and dark, she was seen by a constable wandering about seeking shelter. He took her to the house where the prisoner lodged, and told him the state of his wife, who was ill and without lodging, and explained to him that it was incumbent on him to provide her with lodging and relief. He replied that he had no lodging for her; that she was a nasty beast, and he could not live with her. He shut the window and went away. On the Thursday the prisoner offered to pay for a bed for her at a public house, and she went to bed. On the Friday she died. The deceased was labouring under a complication of diseases, which must have speedily resulted in death. The surgeon stated that he considered the period of her existence had been abridged in consequence of her not having had shelter on the Wednesday night. Gurney, B., told the jury that there was no ground for any charge against the prisoner for having

(g) In *R. v. Pelham*, 8 Q. B. 959, Patteson, J., said as to this dictum, 'I was speaking of the particular facts before me; certainly I did not mean to lay down that there could be no indictment at all if there was no death.'

(h) *R. v. Marriott*, 8 C. & P. 425, Patteson, J.

(hh) *R. v. Instan*, [1893.] 1 Q. B. 450, per Lord Coleridge, C. J., Hawkins, Cave, Day, and Collins, JJ.

caused her death from want of food, as he had regularly paid her allowance to her, and he might have been compelled to pay her a larger sum if that had not been sufficient. Under ordinary circumstances he might have refused to have anything to do with her, but when she was ill and without shelter on a cold and wet night, the question assumed a different aspect, and it was whether they could certainly conclude that his refusal to give her shelter at that time had the effect of causing her death to occur sooner than that event would have happened in the ordinary course of nature. (i)

In another part of this work many cases are mentioned where children of tender years and lunatics have been neglected, abandoned, or ill-treated; but it is sufficient to refer to those decisions in this place.

**By perjury.** — By the ancient common law, a species of killing was held to be murder, concerning which much doubt has been entertained in more modern times, namely, the bearing false witness against another with an express premeditated design to take away his life, so as the innocent person be condemned and executed. (k) But a very long period has elapsed since this offence has been holden to be murder; and in the last instance of a prosecution for it, the prisoners having been convicted, judgment was respited, in order that the point of law might be more fully considered upon a motion in arrest of judgment. (l) The then attorney-general, however, declining to argue the point, the prisoners were discharged of that indictment; but it should seem that there are good grounds for supposing that the attorney-general declined to argue this point from prudential reasons, and principally lest witnesses might be deterred from giving evidence upon capital prosecutions if it must be at the peril of their own lives, but not from any apprehension that the point of law was not maintainable. (m) *In foro conscientie* this offence is, beyond doubt, of the deepest malignity. (n)

**By savage animals.** — If a man has a *beast* that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man, this has been considered by some as manslaughter in the owner; (o)

(i) *R. v. Plummer*, 1 C. & K. 600. The prisoner was acquitted, otherwise the question whether he was bound to provide shelter for his wife would have been reserved.

(k) *Mirror*, c. 1, s. 9. *Brit. c.* 52. *Bract*. lib. 3, c. 4. 1 *Hawk. P. C.* c. 31, s. 7. 3 *Inst.* 91. 4 *Blac. Com.* 196.

(l) *R. v. Macdaniel, Berry, and Jones*, *Fost.* 131. 1 *Leach*, 44. This trial took place in 1756. The prisoners were indicted for murder upon a conspiracy of the kind mentioned in the text against one Kiddon, who had been convicted and executed for a robbery upon the highway, upon the evidence of Berry and Jones.

(m) 4 *Blac. Com.* 196, note (g), where Blackstone, J., says, that he had good grounds for such an opinion, and that nothing should be concluded from the waiving of that prosecution; and in 1 *East, P. C.* c. 5, s. 94, p. 333, note (a), the author states that he had heard Lord Mansfield, C. J., make the same observation, and say, that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment.<sup>1</sup>

(n) See *Dent. c. xix.*, v. 16 *et seq.*

(o) 4 *Blac. Com.* 197.

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<sup>1</sup> Mr. Bishop is of opinion that this old doctrine is not law at the present day, i. a. 564. See also May's *Criminal Law*, p. 216.

and it is agreed by all that such a person is guilty of a very gross misdemeanor : (*p*) and if a man purposely turn such an animal loose, knowing its nature, it is with us (as in the Jewish law) (*q*) as much murder, as if he had incited a bear or a dog to worry people ; and this, though he did it merely to frighten them, and make what is called sport. (*r*)

On an indictment for manslaughter it appeared that the deceased, a child about eight years old, was killed by a kick from the prisoner's horse which had been in his possession about four years, and was a very vicious and dangerous animal, and had kicked and injured several persons, and some of these instances had been brought to the prisoner's knowledge, and he otherwise knew of the propensities of the horse. There is a large common at C. where the ratepayers are accustomed to pasture their horses, and through it there are defined public paths a yard wide or more. Two of them converge near a bridge over the river, and from the point where they meet form a broad path to the river, but the boundaries of this path are ill-defined. The paths are open to the rest of the common. The public have a right to use these paths, but it was not proved that they had a right to traverse the other parts of the common, although they often did traverse it. The prisoner claimed a right as a ratepayer to turn out his horses to pasture on this common, and this right was not disputed. The deceased with some other children was on the common, and when on or very near the broad path, the vicious horse of the prisoner, which had been turned loose by him, kicked at the deceased, struck her on the head, and killed her. It was a question whether the deceased was on the path at the time she was kicked. The question was left to the jury whether the death of the child was caused by the culpable negligence of the prisoner, and they were told that they might find culpable negligence if the evidence satisfied them that the horse was so vicious and accustomed to kick as to be dangerous, and that the prisoner knew that it was so, and with that knowledge turned it loose on the common, through which there were to his knowledge open paths on which the public had a right to pass. The jury found the prisoner guilty of having caused the death by his culpable negligence, but that the evidence did not satisfy them one way or the other whether the child at the time she was kicked was on the path or beyond it. Upon a case reserved, after argument for the prisoner, Erle, C. J., said, 'I am of opinion that this conviction should be affirmed. The prisoner turned upon a common where there was a public footway a very dangerous animal, knowing what its propensities were, and it is found by the jury that the prisoner was guilty of culpable negligence in so doing, and that the death of the child was caused by the culpable negligence of the prisoner. That under ordinary circumstances would be sufficient to sustain a conviction for manslaughter ; but the point contended for by the prisoner is, that the child was not on the path at the time when she was kicked, and her death caused thereby ; and the jury were

(*p*) 1 Hawk. P. C. c. 31, s. 8.

(*q*) Exod. c. xxi. v. 29.

(*r*) 4 Blac. Com. 197, and see 1 Hale, 430, where the author says, that he had

heard that it had been ruled to be murder, at the assizes held at St. Albans for Hertfordshire, and the owner hanged for it ; but that it was but an hearsay.

unable to say whether she was on the footway or beyond at the time. For the purpose of the judgment I assume that the child was not on the footway, but very near it. In point of reason I think that the prisoner ought to be held responsible in this case, and that it is not a ground of acquittal that the child had strayed off the pathway.' (After citing *Barnes v. Ward*, 9 C. B. 414), 'The principle of that case extends to a case like this, where a child walking on a public highway accidentally deviated into the neighbouring land, and met with her death from the kick of a vicious horse close to the public way.' . . . 'The public take a highway on the terms on which it is granted to them by the grantor, and, as between them and the grantor, must use the way subject to its risks; but the public are entitled to use the way without being subject to dangers like that in the present case. It was injurious to persons using the pathway in question to turn on the common a vicious animal of this kind. The judgment is confined to the fact of the child being near to the path at the time, and that, having accidentally strayed from the pathway, but being very near to it, her death was caused by the culpable negligence of the prisoner. I do not wish to sanction the notion that, because a person may not be civilly liable for an act of negligence, he is therefore not criminally liable. It is not necessary to discuss that proposition now; however, I do not accede to it.' (s)

**By want of medical or surgical skill.** — If a physician or surgeon, even though he is not a regular or licensed one, (t) acting with due care and skill, gives his patient a potion or plaster, intending to do him good, and, contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure. (u)

Upon an indictment for manslaughter by causing the death by thrusting a round piece of ivory against the rectum, and thereby making a wound through the rectum, it appeared that upon examination of the body after death, a small hole was discovered perforated through the rectum. The prisoner had attended the deceased, but there was no evidence to shew how the wound had been caused, and questions were put in order to shew that it might have been the result of natural causes, and it was proposed to shew that the prisoner had had a regular medical education, and that a great number of cases had been successfully treated by him. Hullock, B., (stopping the case), 'This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion that it makes no difference whether the party be a regular or irregular surgeon: indeed, in remote parts of the country, many persons

(s) *R. v. Dant*, 10 Cox, C. C. 102. L. & C. 567, 34 L. J. M. C. 119.

(t) 1 Hale, 449. See cases cited, *infra*. But see *Brit. c. 5. 4 Inst. 251. R. v. Simpson, Lancaster, 1829; Wilcock's L.*

*Med. Prof. Append. 227. 1 Lew. 172. 4 C. & P. 407, note (a).*

(u) 4 Blac. Com. 197. 1 Hale, 429; and see *R. v. McLeod, 12 Cox, C. C. 534, post, tit. Manslaughter.*

would be left to die, if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law-books (*v*) have said has been read to you, but they do not state any decisions, and their silence in this respect goes to shew what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord Coke, he merely details an authority, a very old one, without expressing either approbation or disapprobation; however, we find that Lord Hale has laid down what is the law on this subject. That is copied by Blackstone, J., and no book in the law goes any further. It may be that a person not legally qualified to practise as a surgeon may be liable to penalties, but surely he cannot be liable to an indictment for felony. It is quite clear you may recover damages against a medical man for want of skill; but as my Lord Hale (*w*) says, "God forbid that any mischance of this kind should make a person guilty of murder or manslaughter." Such is the opinion of one of the greatest judges that ever adorned the bench of this country; and his proposition amounts to this, that if a person, *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation, which causes the patient's death, he is not guilty of manslaughter. In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. L. has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vexata quæstio* among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter.' (*x*)<sup>1</sup>

The prisoner, who was indicted for the murder of Mrs. D., was not a regularly educated accoucheur, but was a person who had been in the habit of acting as a man-midwife among the lower classes of people. Mrs. D. had been delivered by the prisoner on a Friday, and on the Sunday following an unusual appearance took place, which the medical witnesses stated to be a *prolapsus uteri*; this the prisoner mistook for a remaining part of the *placenta*, which had not been brought away at the time of the delivery: he attempted to bring away the prolapsed *uterus* by force, and in so doing he lacerated the *uterus*, and tore asunder the mesenteric artery; this caused the death of the patient; and it appeared, from the testimony of a number of medical witnesses, that there must have been great want of anatomical knowledge in the prisoner. It was proved that the prisoner had safely delivered many other women. Lord Ellenborough, C. J.: 'There has not been a particle of evidence adduced which goes to convict the

(*v*) 4 Blac. Com. 197. 1 Hale, P. C. 429. 4 Inst. 261.

(*w*) 1 Hale, P. C. 429.

(*x*) R. v. Van Butchell, 3 C. & P. 629, coram Hullock, B., and Littledale, J. Verdict, not guilty.

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<sup>1</sup> See C. v. Thompson, 6 Mass. Rep. 134. Rice v. S., 8 Mo. 561. S. v. Hardister, 38 Ark. 605.



prisoner of the crime of murder, but still it is for you to consider whether the evidence goes as far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill.' (y)

Upon an indictment for manslaughter by feloniously rubbing Miss C. with a dangerous liquid, it appeared that two of the family had died of consumption, but that Miss C. had enjoyed good health. Mrs. C. having heard that the prisoner had said that unless Miss C. put herself under his care she would die of consumption in two or three months, placed her under his course of treatment. The prisoner rubbed a mixture on different parts of the bodies of his patients, and this had been applied to Miss C. on the 3rd of August by the prisoner's servant, and by his direction. On Friday, the 13th of August, a witness went with Miss C. to the prisoner's, respecting a wound on her back, and Miss C. then inhaled; on the next day the prisoner examined her back, and said it was in a beautiful state, and that he would give one hundred guineas if he could produce a similar wound on the persons of some of his patients. The prisoner's attention being directed to a part of the wound which was of a darker appearance, he stated that this proceeded from the inhaling, and that unless those appearances were produced he could expect no beneficial result. The wound at this time was about five or six inches square. Miss C. was suffering much from sickness, and the prisoner said that it was of no consequence, but, on the contrary, a benefit; and that those symptoms, combined with the wound, were a proof that his system was taking due effect. On Sunday, the 15th, Miss C. having got worse, the prisoner said that in two or three days she would be better in health than she had ever been in her life, and spoke very confidently that the result of his system would prolong her life, and that no person could be doing better than she was. At this interview the wound, which had extended, was shewn to the prisoner. At the same time he was desired to do something to stop the sickness, but he said he had a remedy in his pocket, which he would not apply, as he knew the sickness had been beneficial: and he also stated on that day, and on Monday, the 16th, that Miss C. was doing uncommonly well. On Tuesday, the 17th, she died. An eminent surgeon proved that on the Monday her back was extensively inflamed as large as a plate, and in the centre was a spot, as large as the palm of the hand, black, and dead, and in a mortified state, and he thought that some very powerfully stimulating liniment had been applied to her back; that applying a lotion of a strength capable of causing the appearances he saw, to a

(y) *R. v. Williamson*, 3 C. & P. 635. In addition to the facts above stated, it was proved that the prisoner had attended the deceased in seven previous confinements with perfect success, and that the deceased

wished him to attend her in her last confinement. See 4 C. & P. 407, note (a). See *R. v. Spencer*, 10 Cox, C. C. 524, where poison was supplied by mistake.

person of the age and constitution of the deceased, if in perfect health, was likely to damage the constitution and produce disease and danger. The appearances on the back were quite sufficient to account for her death. On the most careful examination of the body, after death, no latent disease or seeds of disease were discovered. It was submitted, for the defence, that, in point of law, this was nothing like a case of manslaughter, and 1 *Hale*, P. C. 429, 4 *Bl. C.* b. 4, c. 14, and *R. v. Van Butchell*, (z) were cited and relied on. J. A. Park, J., 'I am in this difficulty; I have an opinion, and my learned Brother differs from me; I must, therefore, let the case go to the jury.' Garrow, B., 'In *R. v. Van Butchell* the learned judge had very good ground to stop the case, as there was no evidence as to what had been done. I make no distinction between the case of a person, who consults the most eminent physician, and the cases of those whose necessities or whose folly may carry them into any other quarter. It matters not whether the individual consulted be the president of the College of Physicians, the president of the College of Surgeons, or the humblest bone-setter of the village; but be it one or the other, he ought to bring into the case ordinary care, skill, and diligence. Why is it that we convict in cases of death by driving carriages? Because the parties are bound to have skill, care, and caution. I am of opinion that, if a person, who has ever so much or so little skill, sets my leg, and does it as well as he can, and does it badly, he is excused; but suppose the person comes drunk, and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? Because I have a right to have reasonable care and caution.' Park, J., in summing up, 'The learned counsel truly stated in the outset, that whether the party be licensed or unlicensed is of no consequence, except in this respect that he may be subject to pecuniary penalties for acting contrary to charters or Acts of Parliament; but it cannot affect him here.' (After citing 1 *Hale*, 429, as an authority in point, the learned judge proceeded,) 'I agree with my learned Brother, that what is called *mala praxis* in a medical person is a misdemeanor; but that depends upon whether the practice he has used is so bad that everybody will see that it is *mala praxis*. The case at Lancaster (a) differs from this case. I have communicated with Tindal, C. J., who tried that case, and he informed me that the man was a blacksmith, and was drunk, and so completely ignorant of the proper steps, that he totally neglected what was absolutely necessary after the birth of the child. That certainly was one of the most outrageous cases that ever came into a court of justice. I would rather use the words of Lord Ellenborough in *R. v. Williamson*.' (b) (His Lordship read them.) 'And this is important here, for though he be not licensed, yet experience may teach a man sufficient; and the question for you will be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention?' (After setting the authority of *Hale*, P. C. 429, against the dictum of Lord Coke, 4 *Inst.* 251, and citing the observations of Hullock, B., in *R. v. Van Butchell* (c) with approbation, his Lordship

(z) *Supra*, p. 26.(a) Probably Ferguson's case, *post*, p. 32.(b) *Supra*, p. 27.(c) *Supra*, p. 26.

proceeded,) 'The refusal by the prisoner to apply the medicine in order to stop the sickness, although he had it with him, would, in my opinion, if wickedly done, amount to murder; but he mentioned a case in which sickness had been beneficial. Undoubtedly the result proves a very erroneous opinion on his part, and it seems singular that the restlessness and other circumstances did not awaken apprehension, and call for further measures, but the question again recurs, whether this was an erroneous judgment of a person, who was of general competency, though he unfortunately failed in the particular instance.' 'With respect to the application of the mixture, if he commanded the servant to use it, it is the same as if he used it himself. Perhaps from the evidence you will think that the act caused the death; but still the question recurs, as to whether it was done either from gross ignorance or criminal inattention. No one doubts Mr. B.'s skill, but that is not quite the question; it is not whether the act done is the thing that a person of Mr. B.'s great skill would do, but whether it shews such total and gross ignorance in the person who did it, as must necessarily produce such a result. On the one hand, we must be careful and most anxious to prevent people from tampering in physic, so as to trifle with the life of man; and, on the other, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case.' 'If you think there was gross ignorance or scandalous inattention in the conduct of the prisoner, then you will find him guilty; if you do not think so, then your verdict will be otherwise.' (d)

Upon a similar indictment against the same person for causing the death of Mrs. L. it appeared that she put herself under his care on the 6th of October, at which time she was in very good health, to be cured of a complaint she had in her throat. On the 3rd she had applied a small blister to her throat, but the wound occasioned by it was nearly well on the 6th. On the 7th, 8th, 9th, and 10th she went to the prisoner's, and on the evening of the 10th complained to her husband of a violent burning across her chest, in consequence of which he looked at it, and found a great redness across her bosom, darker in the centre than at the other parts; she also complained of great chilliness, and shivered with cold, and passed a very restless and uncomfortable night. On the 11th she was very unwell all the day, the redness was more vivid, and the spot in the centre darker, round the edges white and puffed up, and there was a dirty white discharge from the centre. Cabbage leaves had been applied. On the 12th the redness on the breast and chest was, if anything, greater. In consequence of the symptoms, the husband went to the prisoner, who asked why Mrs. L. had not come to inhale and go on with the rubbing; the husband replied it was impossible, she was so ill; she had been constantly unwell since the night of the 10th, and was suffering a great deal of pain and sickness: the prisoner said it would soon go off, it was generally the case. He was told of the shivering and chilliness, and that some hot wine and water had been given to relieve her; he said hot brandy and water would have been

(d) *R. v. St. John Long*, 4 C. & P. 398. Verdict, guilty. For the defence twenty-nine witnesses were called, who had been

patients of the prisoner, and were satisfied with his skill and diligence.

better, and to put her head under the bed-clothes. He was told that her chest and breast looked very red and very bad ; he said that was generally the case in the first instance, but it would go off as she got better, and that the husband need not be uneasy about it, as there was no fear or danger. In the course of the day the cabbage leaves had been removed, and a dressing of spermaceti ointment put on the chest instead. In the evening the prisoner came and saw Mrs. L. and looked at her breast, and observing the dressing said those greasy plasters had no business there, and she ought to have continued the cabbage leaves. She said she could not bear the pain of keeping them on. He then took off his great coat and said that he would rub it out, and turned up the cuff of his coat as if for the purpose of doing so. She exclaimed very much with fright, and expressed her wonder that he should think of rubbing in the state her breast was in. She asked if there was no way of keeping the leaf on without touching the breast ; and he asked her what she wished ; she replied to be healed. He said it would never heal with those greasy plasters ; that was not the way in which he healed sores. He then asked for a towel, and began dabbing it on the breast, particularly in the centre, where the discharge came from. He said that old linen was the best thing to heal a wound of that kind. She said her skin and flesh were very healthy, and always healed immediately with the simple dressing she had used. He said old linen was better, but she might use the dressing if she liked it, he saw no objection, and when it skinned over he would rub it again. He never saw her afterwards ; she died on the 8th of November. A surgeon proved that on the 12th of October he found a very extensive wound covering the whole anterior part of the chest, which, in his opinion, might be produced by any strong acid : the skin was destroyed ; the centre of the wound was darker, and in a higher state of inflammation than the other parts ; he considered the wound very dangerous to life when he first saw it : the centre spot, and the upper part became gangrenous in about a week ; and in his opinion Mrs. L. died of the wound, and according to his judgment it was not necessary or proper to produce such a wound to prevent any difficulty in swallowing, and he did not know of any disease, in which the production of such a wound would be necessary or proper. The body was internally and externally in perfect health, except a little narrowness at the entrance of the *œsophagus*. Another surgeon stated that he thought that a man of common prudence or skill would not have applied a liquid which in two days would produce such extensive inflammation ; though all irritating external applications sometimes exceeded the expectations of the medical attendant ; but he should say that such conduct was a proof of rashness and of ignorance. It was submitted that this was not manslaughter, but homicide *per infortunium* ; that where the mind is pure, and the intention benevolent, and there are no personal motives, such as a desire of gain, if an operation be performed, which fails, the party is not responsible ; and that the indictment, which in substance charged that the death was occasioned by the external application, was not supported. There was no count imputing ignorance or want of skill, or hastiness, or roughness of practice. Bayley, B., 'I agree with Lord Hale, (e) and do not think that there is

any difference between a licensed and unlicensed surgeon. It does not follow that in the case of either, an act done may not amount to manslaughter. There may be cases in which a regular medical man may be guilty; and that is all that Lord Hale lays down. And that may be laid out of the question in this case. But the manner in which the act is done, and the use of due caution, seem to me to be material. Foster, J., p. 263, speaking of a person who happens to kill another by driving a cart or other carriage, says, "If he might have seen the danger, and did not look before him, it will be manslaughter *for want of due circumspection*." And there is also a passage in Bracton to the like effect. But all that I mean to say now is, that there being conflicting authorities, and the impression on our minds not being in your favour, I propose to reserve the point. As to the indictment not being supported by the evidence, one of the allegations is that the prisoner *feloniously* applied a noxious and injurious matter. And there is no doubt, if the jury should be of opinion against the prisoner, that the facts proved will be sufficient to warrant their finding that the prisoner *feloniously* did the act; for if a man, either with gross ignorance or gross rashness, administers medicine and death ensues, it will be clearly felony.' It was then objected that in this case, as in larceny, there must be a trespass proved. It was not proved that any fraud had been practised by the prisoner to get the patient under his care; nor had there been any avaricious seeking after fees: if there had been it might have been evidence to shew the existence of trespass. In *R. v. Van Butchell*, (f) the case was stopped, because there was no evidence of how the operation was performed, and here there was not any evidence to shew the mode in which the application was made. Bayley, B., 'In this case we may judge of the thing by the effect produced, and that may be evidence from which the jury may say, whether the thing which produced such an effect was not improperly applied.' Bolland, B., 'When you pass the line which the law allows, then you become a trespasser.' Bayley, B., 'If I had a clear opinion in your favour, or if my Brothers had, or if we had any reason to think that other judges were of a different opinion, it would become our duty to give our opinion here, and prevent the case from going to the jury: but feeling as I do, notwithstanding all I have heard to-day, and myself and my Brothers having had our attention directed to the law before we came here, I think it right that the case should go to the jury; I think that if the jury shall find a given fact in the way in which I shall submit it to them, it will constitute the crime of *feloniously* administering, so as to make it manslaughter. I do not charge it on ignorance merely, but there may have been rashness; and I consider that rashness will be sufficient to make it manslaughter. As for instance, if I have a toothache, and a person undertakes to cure it by administering laudanum, and says, "I have no notion how much will be sufficient," but gives me a cup full, which immediately kills me; or if a person prescribing James's powder says, "I have no notion how much should be taken," and yet gives me a table-spoonful, which has the same effect; such persons acting with rashness will, in my opinion, be guilty of manslaughter. With respect to

(f) *Supra*, p. 26.

what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and the willingness of the patient cannot take away the offence against the public.' In summing up, Bayley, B., said 'The points for your consideration are, first: whether Mrs. L. came to her death by the application of the liquid; secondly, whether the prisoner, in applying it, has acted feloniously or not. To my mind it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter.' 'If you shall be of opinion that the prisoner made the application with a gross and culpable degree of rashness, and that it was the cause of Mrs. L.'s death, then, heavy as the charge against him is, he will be answerable on this indictment for the offence of manslaughter. There was a considerable interval between the application of the liquid and the death of the patient; yet if you think that the infliction of the wound on the 10th of October was the cause of the death, then it is no answer to say that a different course of treatment by Mr. C. might have prevented it. You will consider these two points: first, of what did Mrs. L. die? You must be satisfied that she died of the wound, which was the result of the application made on the 10th of October; and then, secondly, if you are satisfied of this, whether the application was a felonious application; this will depend upon whether you think it was gross and culpable rashness in the prisoner to apply a remedy which might produce such effects in such a manner that it did actually produce them. If you think so then he will be answerable to the full extent.' (g)

Any person, whether he be a regularly licensed medical man or not, who professes to deal with the life or health of his Majesty's subjects, is bound to have competent skill to perform the task that he holds himself out to perform, and is bound to treat his patients with care, attention, and assiduity, and if the patient dies for want thereof, such medical man is guilty of manslaughter. (h)

(g) *R. v. St. John Long*, 4 C. & P. 423. Bayley and Bolland, BB., and Bosanquet, J. The prisoner was acquitted. There was no negligence or inattention in the prisoner after the applications, as he did not know where Mrs. L. was until the 12th of October, and after that time she was attended by Mr. C. See *R. v. McLeod*, 12 Cox, C. C. 534, where the prisoner administered morphia without weighing it.

(h) *R. v. Spiller*, 5 C. & P. 333, *coram* Bolland, B., and Bosanquet, J. See also *Lanphier v. Phipos*, 8 C. & P. 475, where Tindal, C. J., said, 'Every person who enters into a learned profession undertakes to bring

to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill: there may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable, and competent degree of skill. See *Ferguson's case*, 1 Lew. 181. *R. v. Spilling*, 2 M. & Rob. 107. *R. v. Moakes*, 4 F. & F. 920, where a chemist made a mistake, and, under the circumstances, it was held not to be negligence.<sup>1</sup>

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<sup>1</sup> It is said that in America some of the judges shew more leniency to the ignorant

medical practitioner. See *Bishop*, i. s. 314, ii. s. 664. *C. v. Thompson*, 6 Mass. 134.

Where the prisoner was a herb doctor, and was charged with causing death by improperly administering medicines, Pollock, C. B., told the jury that 'it is no crime for any one to administer medicine, but it is a crime to administer it so rashly and carelessly as to produce death; and in this respect there is no difference between the most regular practitioner and the greatest quack.'<sup>(i)</sup>

Where the deceased had once been operated upon for cancer, and the disease again appeared in his face, and the prisoner, a blacksmith, told him he could cure him, and the deceased consented to place himself in his hands, and he put some kind of oil on his face, and then applied some kind of powder which caused the greatest agony, and death ensued in nine days; and after the prisoner had been employed there was a line of demarcation around the tumour, and all the tissues were destroyed, as if some powerful caustic had been applied, and the general symptoms shewed poisoning by some irritant poison; and on a *post mortem* examination, marks were found of extensive inflammation in the bowels and numerous ulcerations, which were the effects of mercury applied to the tumour; and the deceased died from the effects of corrosive sublimate. Corrosive sublimate was sometimes applied to wounds, but not to cancer. The deceased must have died of the cancer, but his death was accelerated. Watson, B., directed the jury to find the prisoner guilty if they considered he took upon himself the responsibility of attending to a patient suffering under cancer, when he was not qualified for the purpose. If he used dangerous applications, he was bound to bring skill in their use; and he thought that the prisoner's education and employment made the use of these dangerous substances almost amount to want of skill. The jury must, however, say whether what the prisoner did, produced or accelerated the death; or (and) whether the prisoner in their opinion had acted with neglect in using such remedies (*j*)

Where a prisoner, who had formerly been a butcher by trade, had practised as a surgeon for many years without any legal qualification, was indicted for the manslaughter of a man on whom he had performed an operation for a disease in the bone, and the only question was whether the practice of the prisoner in the particular case amounted to gross and culpable negligence, and several medical men proved that the treatment pursued by the prisoner exhibited the grossest and most culpable ignorance, it was proposed for the defence to call witnesses to prove that the prisoner had treated them for similar complaints successfully, and *R. v. Williamson* (*k*) was relied upon. Maule, J., refused to allow the witnesses to be examined, saying, 'In *R. v. William-*

(i) *R. v. Crick*, 1 F. & F. 519. See *R. v. Webb*, 1 M. & Rob. 405, 2 Lew. 196, where, per Lord Lyndhurst, C. B., 'I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a licence. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter.'

(j) *R. v. Crook*, 1 F. & F. 521. An unskilled practitioner is guilty of negligence if he prescribe dangerous medicines, of the use of which he is ignorant. *R. v. Markuss*, 4 F. & F. 356. *R. v. Chamberlain*, 10 Cox, C. C. 486. *R. v. Bull*, 2 F. & F. 201, where, per Cockburn, C. J., 'If a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care, and if he does it with negligence, he is guilty of manslaughter.'

(k) *Supra*, p. 27.

son the witnesses were asked generally *causa scientiæ*. Neither on the one hand nor the other can other cases be gone into. The attention of the jury must be confined to the present case.' And in summing up the learned judge said, 'If a medical or any other man caused the death of another *intentionally*, that would be murder; but where a person not intending to kill a man, by his gross negligence, unskilfulness, and ignorance caused the death of another, then he would be guilty of culpable homicide; and the question for the jury is, whether the deceased died from the effects of the operation performed on him by the prisoner, and whether the treatment pursued by the prisoner in the case of the deceased was marked by negligence, unskilfulness, and ignorance.' (l)

**By infection.** — A question is put by Lord Hale, whether, if a person infected with the plague should go abroad with the intention of infecting another, and another should thereby be infected and die, this would not be murder; but it is admitted that, if no such intention should evidently appear, it would not be felony, though a great misdemeanor. (m) It may be observed, that an offence of this sort in breach of quarantine is punishable by statute. (n)

**By rape.** — A question has been raised, whether an indictment for murder could be maintained for killing a female infant by *ravishing* her; but the point was not decided. (o) But there is no doubt that it may. The prisoner was indicted for the murder of a child under ten, and it appeared that he had had connection with her and given her the venereal disease; and Wightman, J., told the jury that if they were of opinion that the prisoner had had connection with her, and she died from its effects, then the act being, under the circumstances of the case, a felony in point of law, this would of itself be such malice as would justify them in finding him guilty of murder. (p)

## SEC. V.

### *Time of Death—Treatment of Wounds—Killing Person labouring under Disease.*

**Time of death.** — It is agreed that no person shall be adjudged by any act whatever to kill another, who does not die thereof within a year and a day after the stroke received, or cause of death admin-

(l) *R. v. Whitehead*, 3 C. & K. 202.

(m) 1 Hale, 432. See *R. v. Greenwood*, *infra*.

(n) 6 Geo. 4, c. 78, s. 17. Vol. i. p. 272.

(o) *R. v. Ladd*, 1 Leach, 96. 1 East, P. C. c. 226. The judges to whom the case was referred gave no opinion upon the point, as the indictment was holden to be defective.

(p) *R. v. Greenwood*, 7 Cox, C. C. 404. The report proceeds, 'The jury retired, and, after some time, returned into Court, saying

that they were satisfied that he had had connection, and that her death resulted therefrom, but were not agreed as to finding him guilty of murder. Wightman, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter, and that they might ignore the doctrine of constructive malice if they thought fit. The jury found a verdict of manslaughter.' *Sed quære*. C. S. G.



istered, in the computation of which the whole day upon which the hurt was done is to be reckoned the first. (*q*)

**Treatment of wounds.**<sup>1</sup>—Questions may occasionally arise as to the treatment of the wound or hurt received by the party killed. Upon this subject it has been ruled, that if a man give another a stroke not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and day, it is murder, or other species of homicide, as the case may be; though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the immediate cause of the death, *causa causati*. (*r*) Thus, it was resolved, that if one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according to the circumstances; because if the wounds had not been, the man had not died; and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them. (*s*) So where on an indictment for murder it appeared that the deceased had been waylaid and assaulted by the prisoner and severely cut across one of his fingers by an iron instrument, and the surgeon urged him to submit to amputation, but he refused, though he was told that his life would be in great hazard; and it was dressed day by day for a fortnight; when lock-jaw came on, induced by the wound in the finger, and the finger was then amputated, but too late; and the lock-jaw ultimately caused death: and the surgeon thought it most probable that the life would have been saved if the finger had been amputated in the first instance; and it was contended that it was the obstinate refusal to submit to amputation that was the cause of the death; Maule, J., held that that was no defence; and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound, which was ultimately the cause of the death, he was guilty of murder; that for this purpose it made no difference

(*q*) 1 Hawk. P. C. c. 31, s. 9. 4 Blac. Com. 197. 1 East, P. C. c. 5, s. 112, pp. 343, 344.

(*r*) 1 Hale, 428.

(*s*) *Rew's case*, Kel. 26.

#### AMERICAN NOTE.

<sup>1</sup> See *C. v. Green*, 1 Ashm. 289. *C. v. M'Pike*, 3 Cush. 181. *S. v. Corbett*, 1 Jones (Law) 267. *M'Allister v. S.*, 17 Ala. 434. *Bowles v. S.*, 58 Ala. 335. *Kee v. S.* 28 Ark. 155. As to grossly erroneous treatment by surgeon exonerating the original wrongdoer, see *Persons v. S.*, 21 Ala. 300. *C. v. Hackett*, 2 Allen, 136. The law in America seems to

accord with that in England, though perhaps some of the cases may appear to favour the view that if the wound is not dangerous in itself, and the treatment is grossly erroneous, the person who has inflicted the wound is not guilty of felonious homicide. *Bishop*, ii. ss. 638, 639.

whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question was whether in the end the wound was the cause of death. (t)

Where on an indictment against a principal in the second degree for murder by shooting in a duel, after the examination of the first medical witness, who stated his opinion that the operation (of which no account is given in the report) was the only chance of saving the life of the deceased; the counsel for the prisoner were proceeding to cross-examine him as to the nature and seat of the wound, to shew that the opinions he had expressed of its danger and the necessity of the operation were not correct; Erle, J., said, 'I presume you propose to call counter-evidence and impeach the propriety of the operation; but I am clearly of opinion that if a dangerous wound is given, and the best advice is taken, and an operation performed under that advice, which is the immediate cause of death, the party giving the wound is criminally responsible.' It was proposed to shew that the opinion formed by the medical men was grounded upon erroneous premises, and that no operation was necessary at all, or at least that an easier and much less dangerous operation ought to have been adopted; and it was submitted that a person is not criminally responsible where the death is caused by consequences which are not physically the consequences of the wound, but can only be connected with the first wound by moral reasonings; as here that which occasioned death was the operation, which supervened upon the wound, because the medical men thought it necessary. Erle, J., 'I am clearly of opinion, and so is my Brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they *bond fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible, and of course those who aided and abetted him in it. I so rule on the present occasion; but it may be taken, for the purpose of future consideration, that it having been proved that there was a gunshot wound, and a pulsating tumour arising therefrom, which, in the *bond fide* opinion of competent medical men, was dangerous to life, and that they considered a certain operation necessary, which was skillfully performed, and was the immediate and proximate cause of death; the counsel for the prisoner tendered evidence to shew this opinion was wrong, and that the wound would not have inevitably caused death, and that by other treatment the operation might have been avoided, and was therefore unnecessary. I will reserve this point for the consideration of the judges, although I have no doubt upon the subject. To admit this evidence would be to raise a collateral issue in every case as to the degree of skill which the medical men possessed.' (u)

Where the deceased had been severely kicked on the stomach, and brandy had been given her by a surgeon to restore her, and

(t) R. v. Holland, 2 M. & Rob. 351.

(u) R. v. Pym, 1 Cox, C. C. 339. Acquittal.<sup>1</sup>

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AMERICAN NOTE.

<sup>1</sup> See *Powell v. S.*, 13 Tex. Ap. 244. *C. v. Costley*, 118 Mass. 1. *S. v. Scates*, 5 Jones (N. C.), 420.

part of it had gone the wrong way into the lungs, and might, per-adventure, have caused the death, the prisoner was convicted of manslaughter, and Coleridge, J., said the case was like that where a dangerous wound was given, and an operation was performed. (v)

The prisoner had a fight with the deceased and struck him on the jaw, breaking it in two places. He was removed to a hospital and an operation was found to be necessary. Chloroform was administered, and the patient died under its administration. It was not disputed that if the chloroform had not been administered the man would not have died. Mathew, J., after consulting Field, J., held that since the chloroform had been properly administered by a regular medical practitioner, the fact that the death primarily resulted from its use could not affect the criminal responsibility of the accused, and told the jury that if an injury was inflicted by one man on another which compelled the injured man to take medical advice, and if death ensued from or in the course of an operation advised by the medical man, the assailant was responsible in the eye of the law. The jury must be satisfied that the prisoner injured the deceased; that he rightly consulted a competent medical man; that an operation was recommended for which the administration of chloroform was necessary; and that the deceased died from that administration. (vv)

**Killing a person labouring under disease.** <sup>1</sup> — If a man be sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently or speedily, this is murder or other homicide, according to the circumstances, in the party by whom such wound or hurt was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received; and it shall not be permitted to the offender to apportion his own wrong. (w)

Where a husband was indicted for the manslaughter of his wife by accelerating her death by blows, and it appeared that she was at the time in so bad a state of health that she could not possibly have lived more than a month or six weeks under any circumstances: Coleridge, J., told the jury that if a person inflicted an injury upon a person labouring under a mortal disease, which caused that person to die sooner than he otherwise would have done, he was liable to be

(v) *R. v. McIntyre*, 2 Cox, C. C. 379.

(vv) *R. v. Davis*, 15 Cox, C. C. 174.

(w) 1 Hale, 428. Lord Hale says that thus he had heard that learned and wise judge, Rolle, J., frequently direct. See Johnson's case, 1 Lewin, 164, where on an indictment for manslaughter in causing a death by a blow on the stomach, on a surgeon stating that a blow on the stomach in this state of things, arising from passion and intoxication, was calculated to occasion death, but not so if the party was sober, Hullock, B., is said to have directed an acquittal,

saying, 'that where the death was occasioned partly by a blow, and partly by a predisposing circumstance, it was impossible so to apportion the operations of the several causes as to be able to say with certainty that the death was immediately occasioned by any one of them in particular.' This ruling is questioned in Roscoe, Cr. Evid. 647, and as it should seem with very good reason, as it is contrary to the other authorities upon this point. C. S. G. See *R. v. Martin*, 5 C. & P. 128, Parke, B.

#### AMERICAN NOTE.

<sup>1</sup> The law is the same in America. See *C. v. Fox*, 7 Gray, 585. *S. v. Castello*, 62 Iowa, 404. *S. v. O'Brien*, 46 N. W. Rep. 752; but see *Livingston v. C.*, 121 Gratt. (Va.) 592.

found guilty of manslaughter, and the question for them was whether the death of the wife was caused by the disease under which she was labouring, or whether it was hastened by the ill usage of the prisoner. (x)

## SEC. VI.

*Cases of Provocation.*

As the indulgence which is shewn by the law in some cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. (y) All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. (z) For there are many trivial, and some considerable provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead.

**Words of provocation.**<sup>2</sup> — Where the prisoner was indicted for the wilful murder of his wife, Blackburn, J., in summing up, said: ‘As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he, having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: “Aye; but I’ll take no more for thee, for I will have no more children of thee. I have done it once, and I’ll do it again.” Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a

(x) *R. v. Fletcher*, Gloucester Spr. Ass. 1841. MSS. C. S. G. See *R. v. Murton*, 3 F. & F. 492, S. P. *R. v. Webb*, 1 M. & Rob. 405. 2 Lew. 196.

(y) *Fost.* 315.<sup>1</sup>

(z) 1 East, P. C. c. 5, s. 19, p. 232.

## AMERICAN NOTES.

<sup>1</sup> It would seem from many passages in Mr. Bishop's book (see vol. ii. ss. 697 *et seq.*) that passion, however induced, is considered to be inconsistent with malice aforethought, while in England only that sudden passion which is caused by sudden provocation is allowed to reduce the killing to manslaughter. See also *S. v. Johnson*, 1 Ired. N. C. 354.

<sup>2</sup> Words may give character to acts of

menace and so may make an act, otherwise without meaning, an act of provocation, reducing the subsequent killing to manslaughter. *Watson v. S.*, 82 Ala. 10. *S. v. Keene*, 50 Mo. 357. *Pridgen v. S.*, 31 Tex. 420. See also Bishop, i. s. 872. There are States in America where special statutes give words an effect in reducing a killing to manslaughter. See Bishop, ii. s. 704 (4).

man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did?' (a)

If a party, being provoked by another making use of words of reproach or contemptuous or insulting actions or gestures, give the other a box on the ear, or strike him with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. (c)

A., passing by the shop of B., distorted his mouth, and smiled at him, and B. killed him: this was held murder; for it was no such provocation as would abate the presumption of malice in the party killing. (d)

Dangerfield was sentenced for a gross libel to be flogged from Newgate to Tyburn, and as he was returning from Tyburn, Frances, a barrister, asked him, in a jeering way, whether he had run his heat that day; he replied in scurrilous words; whereon Frances ran him into the eye with a small cane in his hand, and of this wound Dangerfield died, and Frances was executed for his murder. (e)

If A. be passing along the street, and B., meeting him (there being a convenient distance between A. and the wall) take the wall of him, and thereupon A. kill B., this is a murder; but if B. had jostled A., his jostling had been a provocation, and would have made it manslaughter. (f)

If there be a chiding between husband and wife, and the husband strike his wife thereupon with a pestle, so that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter. (g)

A woman called a man, who was sitting drinking in an alehouse, 'a son of a whore,' upon which the man took up a broomstaff, and at a distance threw it at her and killed her; and it was propounded to the judges whether this was murder or manslaughter. Two questions were made, 1. Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter. 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so improbable to cause death, would not alter the case. The judges were not unanimous upon this case; and a pardon was recommended. (h)

In a case where it was decided that if A. give slighting words to B., and B. thereupon immediately kill him, such killing would be

(a) *R. v. Rothwell*, 12 Cox, C. C. 145. It is submitted that the law is here correctly stated by Blackburn, J., though there are authorities the other way. In *Foster's Crown Law*, p. 290, it is stated, 'words of reproach, how grievous soever, are not a provocation, sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures expressive of contempt or reproach, without an assault upon the person.' And see 1 East, P. C. c. 5, s. 29, p. 233, and cases *infra*.

(c) *Fost.* 291. 1 East, P. C. c. 5, s. 20, p. 233. 1 Hawk. P. C. c. 31, s. 33. 1 Hale,

455. *Woodhead's case*, 1 Lewin, 163. *Hullock*, B.

(d) *Brain's case*, 1 Hale, 455. *Cro. Eliz.* 778. *Kel.* 131.

(e) *R. v. Frances*, 3 Mod. R. 68, in *R. v. Dangerfield*.

(f) 1 Hale, 455. But this case probably supposes considerable violence and insult in the jostling.

(g) *Crompt.* fol. 120 (a). See also *Kel.* 64. 1 Hale, 456. This proceeded on the ground that the pestle was an instrument likely to endanger life; see *post*, p. 43.

(h) 1 Hale, 455, 456.

murder in B., it is also stated to have been holden, that words of *menace or bodily harm* would amount to such a provocation as would reduce the offence of killing to manslaughter. (*i*) But it should be observed, that in another report of the same case this latter position is not to be found. (*j*) And it has been stated that such words ought at least to be accompanied by some act, denoting an immediate intention of following them up by an actual assault. (*k*)

It seems that if A. give indecent language to B., and B. thereupon strike A., but not mortally, and then A. strike B. again, and then B. kill A., that this is but manslaughter. The stroke by A. was deemed a new provocation, and the conflict a sudden falling out; and on those grounds the killing was considered as only manslaughter. (*l*)<sup>1</sup>

**Provocation by assault.**—Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, (*m*) yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow. (*n*) Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice. (*o*)

Upon an indictment for murder it appeared that upon the evening before the death the prisoner and the deceased had been quarrelling, and that the deceased had used very aggravating language, as well as very indecent and insulting gestures to the prisoner. The deceased was found dead the next morning with a wound in the throat, which had caused her death, and had been inflicted by some sharp instrument, such as a razor. Within a short distance of the deceased there was lying a sweeping-brush in such a position that it might be supposed to have fallen from the hand of the deceased, supposing that a scuffle had taken place before the fatal wound had been inflicted. Pollock, C. B., in summing up, said, 'It is true that no provocation by words only (*oo*) will reduce the crime of murder to that of manslaughter, but it is equally true that every provocation by blows will not have this effect, particularly when, as in this case, the prisoner appears to have resented the blow by using a weapon calculated to cause death. Still, however, if there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which

(*i*) Lord Morley's case, 1 Hale, 455.

(*j*) Kel. 55.

(*k*) 1 East, P. C. c. 5, s. 20, p. 233.

(*l*) 1 Hale, 455, where it is said, that this was held to be manslaughter, according to the proverb, 'the second blow makes the affray;' and Lord Hale says that this was the opinion of himself and some others.

(*m*) Kel. 135. 4 Blac. Com. 191. 1 East, P. C. c. 5, s. 20, p. 233. 1 Hale, 455. Lanure's case.

(*n*) See R. v. Lynch, 5 C. & P. 324, per Lord Tenterden, C. J., *post*, p. 55.

(*o*) Per Lord Holt in Keate's case, Comb. 408.

(*oo*) But see *ante*, p. 39.

#### AMERICAN NOTE.

<sup>1</sup> See Allen v. S., 5 Yerg. 453. Jacob v. S., 3 Humph. 493. U. S. v. Mingo, 2 Curtis, C. C. 1. S. v. Underwood, 57 Mo. 40.

would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only.' (p)

There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants. A woman, seeing him run in that manner, cried out, 'You will not murder the man, will you?' Stedman replied, 'What is that to you, you bitch?' The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J., that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter. (q) The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact. (r)

Upon an indictment for murder by strangling, it appeared that the prisoner had said, 'We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down; he got up, and I knocked him down again, and kicked him, and then I put a rope round his neck, and dragged him into the ditch.' Patteson, J., said to the jury, 'If you even believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, and strangles him, that is murder. The act is so wilful and deliberate that nothing can justify it.' (s)

Where a sergeant in the army laid hold of a fifer, and insisted upon carrying him to prison: the fifer resisted, and whilst the sergeant had hold of him to force him, he drew the sergeant's sword, plunged it into his body, and killed him. The sergeant had no right to make the arrest, except under the articles of war; and the articles of war were not given in evidence. Buller, J., considered it in two lights: first, if the sergeant had authority; and, secondly, if he had not, on account of the coolness, deliberation, and reflection with which the stab was given. The jury found the prisoner guilty: but the judges were unanimous, that the articles of war should have been produced; and, for want thereof, held the conviction wrong. (t)

A drummer and a private soldier stopped at an inn with a deserter, and were pressed by one Martin to enlist him; and they gave him a shilling for that purpose, but they had no authority to enlist any-

(p) *R. v. Sherwood*, 1 C. & K. 556. *R. v. Smith*, 4 F. & F. 1066.

(q) *Stedman's case*, *Fost.* 292. *MS. Tracy and Denton*, 57. 1 *East*, P. C. c. 5, s. 21, p. 234.

(r) *Fost.* 292. See *R. v. Tranter*, *Stra.* 49.

(s) *R. v. Shaw*, 6 C. & P. 372, *Patteson, J.*

(t) *R. v. Withers*, *Mich. T.* 1784, *MS. Bayley, J.*, and 1 *East*, P. C. c. 5, s. 20, p. 233. This case is also cited as to a point of evidence in *Holt's case*, 2 *Leach*, 594. *Buckner's case*, *Sty.* 467.

body. Martin wanted afterwards to go away; but they would not let him, and a crowd collected. The drummer drew his sword, stood in the doorway of the room where they were, and swore he would stab any one who offered to go away. The landlord, however, got by him; and the landlord's son seized his arm in which the sword was, and was wrestling the sword from him, when the private, who had been struggling with Martin, came behind the son, and stabbed him in the back. He was indicted upon the statute 43 Geo. 3, and it was urged for the prisoner, that the soldiers had a right to enlist Martin, and to detain him; and that if death had ensued, the offence would not have been murder; but, upon the point being saved, the judges were all of a contrary opinion. (*u*)

Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unseasonableness of the hour, and advised them to go to their quarters; whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the same answer; and on his refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door, where when the landlord came he received a violent blow on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken; more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with. (*v*)

In cases of provocation of a slighter kind, not amounting to an assault, as the ground of extenuation would be that the act of resentment, which has unhappily proved fatal, did not proceed from malice, or a spirit of revenge, but was intended merely for correction; so the material inquiry will be, whether malice must be inferred from the sort of punishment inflicted, from the nature of the instrument used, and from the manner of the chastisement. (*w*) For if, on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner, so that he dies, it is murder by express malice;

(*u*) *R. v. Longden*, MS. Bayley, J., *min Sum. Ass.* 1791. MS. 1 East, P. C. c. 5, s. 56, p. 288.<sup>1</sup>

(*v*) *R. v. Willoughby and another*, Bod- (*w*) 1 East, P. C. c. 5, s. 22, p. 235, and s. 23, pp. 238, 9.

#### AMERICAN NOTE.

<sup>1</sup> It is said (see Bishop, i. s. 843) that even where another is meditating the taking of one's life, some overt act must be done in pursuance of such meditation before the

would-be assassin can be killed; in other words, the danger must be immediate. See also Wharton on Homicide, § 493, *et seq.*



though the person so beating the other did not intend to kill him. (x)

Thus the case which has been before mentioned, where, upon a chiding between husband and wife, the husband struck his wife with a pestle, (y) proceeded upon the ground of the pestle being an instrument likely to endanger life. (z).

One Freeman, a soldier, was in a public-house drinking, and asked a girl who was sitting there to drink with him: upon which one Ann Simpson, with whom he had cohabited, seized his pot, abused him very much, and threw down his beer. Freeman then caught the pot from her, and struck her twice on the head with it: the blood gushed out, and she was taken to a hospital, where the wound was examined, and did not appear dangerous, being about a quarter of an inch deep: but it produced an erysipelas, which caused an inflammation of the brain, and the woman died. The witness, who saw the blows, did not think the prisoner intended to do the woman any grievous bodily harm. Gibbs, C. B., told the jury, that if the disease which caused the death originated from the wound, it was the same as if the wound had caused the death; that the primary cause was to be considered; that the aggravation, though not constituting a provocation which would extenuate the giving a deadly blow, would palliate the giving a moderate blow; and he left it to the jury whether those blows were such as were likely to be followed by death, or by a disease likely to terminate in death. The jury thought that the blows were not of this kind, and the prisoner was found guilty of manslaughter only. (a)

If, without adequate provocation, a person strikes another with a deadly weapon, likely to occasion death, although he had no previous malice against the party, yet he is to be presumed to have had such malice at the moment from the circumstances, and he is guilty of murder. (b) Where, therefore, a boy, twelve years old, who had been in the habit of going to a cooper's shop and taking away chips, was told one morning by the cooper's apprentice not to come again; he however went again in the afternoon, and the apprentice spread his arms out to prevent his reaching the spot where he usually gathered the chips, on which the boy started off, and in passing a work bench, took up a whittle (a sharp-pointed steel knife with a long handle) and threw it at the apprentice, and the blade of the whittle entered his body, to the depth of four inches, and caused his death; the jury having found him guilty upon an indictment for manslaughter, Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge. (c) So where on an in-

(x) 4 Blac. Com. 199.

(y) *Ante*, p. 39.

(z) 1 East, P. C. c. 5, s. 22, p. 235.

(a) *R. v. Freeman*, O. B. Jan. 1814, S. Bayley, J.

(b) *Per Hullock, B., Langstaffe's case*,

1 Lewin, 162.<sup>1</sup>

(c) *Langstaffe's case, supra.*

#### AMERICAN NOTE.

<sup>1</sup> The question whether a weapon is deadly is generally for the jury. *S. v. Collins*, 8 Ired. 407. *S. v. Ostrander*, 18 Iowa, 435. Malice will be presumed from the use of a

deadly weapon. *S. v. Shippey*, 10 Minn. 223. *S. v. Gillick*, 7 Clarke, 287. *S. v. Musick*, 101 Mo. 260.

dictment for wounding it appeared that Withy and two women met the prisoner at midnight on the highway, and some words passed between them; when Withy struck the prisoner, who then made a blow with a knife, it was held that unless the prisoner apprehended robbery or some similar offence, or danger to life or some serious bodily harm, not simply being knocked down, he would not be justified in using the knife in self-defence. (*d*)

**Nature of the instrument used.**<sup>1</sup> — The nature of the *instrument used* was much considered in the following case: — The prisoner's son fought with another boy, and was beaten; he ran home to his father all bloody, who presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died. (*e*) This was ruled manslaughter, because done in a sudden heat and passion; but upon this case Foster, J., makes the following remarks: (*f*) 'Surely the provocation was not very grievous. The boy had fought with one who happened to be an over-match for him, and was worsted; a disaster slight enough, and very frequent among boys. If upon this provocation the father, after running three quarters of a mile, had set his strength against the child, had despatched him with a hedge stake, or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder; since any of these circumstances would have been a plain indication of malice; but with regard to these circumstances, with what weapon, or to what degree, the child was beaten, Coke is totally silent. But Croke (*g*) sets the case in a much clearer light, and at the same time leads his readers into the true grounds of the judgment. His words are, "Rowley struck the child with a *small cudgel*, of which stroke he *afterwards* died." I think it may be fairly collected from *Croke's* manner of speaking and *Godbolt's* report, (*h*) that the accident happened *by a single stroke with a cudgel not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. I observe that Lord Raymond lays great stress on this circumstance: *that the stroke was with a cudgel, not likely to kill.*' (*i*)

Where upon a special verdict it was found that the prisoner having employed her daughter-in-law, a child of ten years old, to reel

(*d*) R. v. Hewlett, 1 F. & F. 91, Crowder, J.

(*e*) Rowley's case, 12 Rep. 87; S. C. 1 Hale, 453, in which report the words are, 'and strikes C. that he dies.' Foster, J., in citing the case, says, that the father, after running three quarters of a mile, beats the other boy, 'who dieth of this beating.' Fost. 294.

(*f*) Fost. 294.

(*g*) Cro. Jac. 296.

(*h*) Godb. 182. It is there said to have been a 'rod,' meaning probably a small wand or switch.

(*i*) 2 Lord Raym. 1498. *Ante*, note (*e*). See R. v. Walsh, 11 Cox, C. C. 336.

#### AMERICAN NOTE.

<sup>1</sup> The question of the nature of the instrument has sometimes been held to be a question for the Court not for the jury. S. v. West, 6 Jones, N. C. 505. C. v. O'Brien, 119 Mass. 342, 20 Am. R. 325. But see S. v. Harper, 69 Mo. 425, and S. v. Collins,

*ante*. But if the deadly nature of the weapon is to be inferred from the manner of its use, this latter is for the jury. Blige v. S., 20 Fla. 424; 51 Am. R. 628. See S. v. Roane, 2 Dev. 58. S. v. West, *supra*.

some yarn, and finding some of the skeins knotted threw at the child a *four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and the stool was of sufficient size and weight to give a mortal blow, but the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered as of great difficulty, and no opinion was ever delivered by the judges. (*j*) The doubt appears to have been principally upon the question, whether the instrument was such as would probably, at the given distance, have occasioned death or great bodily harm. (*k*)

And in a case where the prisoner had struck his boy with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the instrument he had made use of, have had any intention to take away the boy's life. (*l*)

In a case where the prisoner, who was a butcher, had employed a boy to tend some sheep, which were penned, who negligently suffered some of the sheep to escape through the hurdles, upon which the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him, and with it hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died; Nares, J., told the jury to consider whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his passion, was, or was not, under the circumstances, and in the particular situation, an improper instrument for the purpose of correcting the negligence of the boy; and that, if they thought the stake was an improper instrument, they should further consider, whether it was probable that it was used with an intent to kill; if they thought it was, that they must find the prisoner guilty of murder; but, on the contrary, if they were persuaded that it was not done with an intent to kill, that the crime would then amount, at most, to manslaughter. The jury found it manslaughter. (*m*) So on an indictment for wounding with a tin can, with which the prisoner had struck the prosecutor four times on the head, Alderson, B., directed the jury to consider, 'whether the instrument employed was, in its ordinary use, likely to cause death; or, though an instrument unlikely, under ordinary circumstances, to cause death; whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise? A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but if the prisoner struck the prosecutor repeated blows on the head with it, you will say, whether he did this merely to hurt the prosecutor, and give him pain, as by giving him a black eye or bloody nose, or whether he did it to do him some substantial grievous bodily harm. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent

(*j*) Hazel's case, 1 Leach, 368.

(*k*) 1 East, P. C. c. 5, s. 22, p. 236.  
1 Hale, 455, 456.

(*l*) Turner's case, cited in Comb. 407, 408, and 1 Lord Raym. 143, 144. 2 Lord Raym. 1498. The clog was a small one; and Holt, C. J., said, that it was an unlikely thing to kill the boy.

(*m*) Wiggs' case, reported in a note to Hazel's case, 1 Leach, 378. If, however, the instrument used is so improper as manifestly to endanger life, it seems that the intention of the party to kill will be implied from that circumstance, *infra*.

of the party is manifest; but where an instrument like the present is used, you must consider, whether the mode in which it was used satisfactorily shews that the prisoner intended to inflict some serious or grievous bodily harm with it.' (n)

Upon an indictment for murder, it appeared that a body of persons were committing a riot, and the constables interfering for the purpose of dispersing the crowd, and apprehending the offenders, resistance was made to them by the mob, and one of the constables was beaten severely by the mob; the different prisoners all took part in the violence used; some by beating him with sticks, some by throwing stones, and others by striking him with their fists; of this aggregate violence, the constable afterwards died. Alderson, B., 'The principles on which this case will turn, are these:—If a person attacks another without justifiable cause, and from the violence used death ensues, the question which arises is, whether it be murder or manslaughter? If the weapon used were a deadly weapon, it is reasonable to infer that the party intended death; and if he intended death, and death was the consequence of his act, it is murder. If no weapon was used, then the question usually is, was there excessive violence? If the evidence as to this be such as that the jury think there was an intention to kill, it is murder; if not, manslaughter. Thus, if there were merely a blow with a fist, and death ensued, it would not be reasonable to infer that there was an intention to kill; in that case, therefore, it is manslaughter. But if a strong man attacks a weak one, though no weapon be used, or if, after much injury by beating, the violence is still continued, then the question is whether this excess does not shew a general brutality, and a purpose to kill, and if so, it is murder. Again, if the weapon used be not deadly, *e.g.* a stick, then the same question as above will arise as to the purpose to kill; and in any case if the nature of the violence, and the continuance of it be such, as that a rational man would conclude that death must follow from the acts done, then it is reasonable for a jury to infer that the party who did them intended to kill, and to find him guilty of murder. Again, it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent. Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done. Here, therefore, in considering this case, you must determine, whether all these prisoners had the common intent of attacking the constables; if so, each of them is responsible for all the acts of all the others done for that purpose; and if all the acts done by each, if done by one man, would together shew such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such purpose, you ought to find them guilty only of manslaughter.' (o)

**Provocations of a slight kind.** — There are instances, where slight

(n) R. v. Howlett, 7 C. & P. 274,  
Alderson, B.

(o) Macklin's case, 2 Lew. 225, Alderson, B.

provocations have been considered as extenuating the guilt of homicide, upon the ground, that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear, that the punishment was not administered with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life. (*q*)

Where a person whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for, though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given. (*r*)

Where A. finding a trespasser upon his land, in the first transport of his passion, beat him and unluckily killed him, and it was holden to be manslaughter, (*s*) it must be understood that he beat the trespasser, not with a mischievous intention, but merely to chastise him, and to deter him from a future commission of such a trespass. For if A. had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. (*t*) Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died: he was convicted of murder, and executed. (*u*)

Where the trespass is barely against the property of another the law does not admit the force of the provocation as sufficient to warrant the owner in making use of any deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass. But if the beating be with an instrument, or in a manner not likely to kill, it will only amount to man-

(*q*) *Fost.* 291.

(*r*) *Fray's case.* *Old Bailey*, 1785. 1 *Hawk. P. C. c.* 31, s. 38. 1 *East, P. C. c.* 5, s. 22, p. 236.

(*s*) 1 *Hale*, 473. 1 *East, P. C. c.* 5, s. 22, p. 237.<sup>1</sup>

(*t*) *Fost.* 291.

(*u*) *Moir's case*, *Rosc. Cr. E.* 717, *Lord Tenterden, C. J.* See this case as stated in *R. v. Price*, 7 *C. & P.* 178. *Moir* had gone home to fetch his pistols after he found the deceased trespassing, and the deceased persisted in trespassing, and some angry words passed before the pistol was discharged.

#### AMERICAN NOTE.

<sup>1</sup> See *C. v. Drew*, 4 *Mass.* 391. *P. v. Norton*, 4 *Mich.* 67. *S. v. Skippey*, 10 *Minn.* 223. *S. v. Patterson*, 45 *Vt.* 308. *Carroll v. S.*, 23 *Ala.* 28. As to spring guns; *S. v. Moon*, 31 *Conn.* 477. "The doctrine" (says *Mr. Bishop*, vol. ii. s. 708. note 1) "that passion excited by a trespass

to property can never reduce the killing with a deadly weapon to manslaughter is too hard for human nature; and though stated many times in the books is not sufficiently founded in actual adjudication to be received without further examination."

slaughter: and it is even lawful to exert such force against a trespasser, who comes without any colour, to take the goods of another, as is necessary to make him desist. (*v*)

A man is not authorised to fire a pistol on every intrusion or invasion of his dwelling-house, which may be made forcibly at night; he ought, if he has a reasonable opportunity, to endeavour to remove the trespasser, without having recourse to the last extremity. *M.*, who was indicted for murder, had made himself obnoxious to some boatmen, by giving information of certain smuggling transactions, in which some of them had been engaged; and they, in revenge, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police; the boatmen, however, as he was going away, called to him that they would come at night, and pull his house down: in the middle of the night a great number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention. *M.*, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. *Holroyd, J.*, 'A civil trespass will not excuse the firing a pistol at a trespasser, in sudden resentment or anger. If a person take forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters into the dwelling of another; but a man is not authorised to fire a pistol on every intrusion or invasion of his house: he ought, if he has a reasonable opportunity, to endeavour to remove him without having recourse to the last extremity: but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle: and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorise an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence: if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person, in the heat of blood, kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up, by way of making an attack, and, without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If you are of opinion that the prisoner was really attacked, and that the deceased and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he was, perhaps, justified in firing as he did.' (*w*)

A person must only use so much force as is reasonably necessary, in order to turn a trespasser out of his house. Upon an indictment for manslaughter, it appeared that the prisoner, upon returning home, found the deceased in his house, and desired him to withdraw,

(*v*) 1 Hale, 473, 486. 1 East, P. C. c. 5, s. 56, p. 289.

(*w*) Meade's case, 1 Lew. 184, *Holroyd, J.*

but he refused to go: upon this, words arose between them, and the prisoner becoming excited, proceeded to use force, and, by a kick which he gave to the deceased, caused his death. Alderson, B.: 'A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If a person becomes excited, and gives another a kick, it is an unjustifiable act. If the deceased would not have died but for the injury he received, the prisoner, having unlawfully caused that injury, is guilty of manslaughter.' (x)

Upon an indictment for manslaughter, it appeared that a man and his servant had insisted upon placing corn in the prisoner's barn, which she refused to allow; they exerted force: a scuffle took place, in which the prisoner received a blow on the breast, whereon she threw a stone at the deceased, the master, which killed him. Holroyd, J.: 'The case fails, as it appears the deceased received the blow in an attempt to invade the prisoner's barn, against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose; and she is not answerable for any unforeseen accident that may have happened in so doing.' (y)

Where a man finds another in the act of adultery with his wife, and kills him or her (z) in the first transport of passion, he is only guilty of manslaughter, and that in the lowest degree: (a) for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But, as will presently be shewn, the killing of an adulterer deliberately, and upon revenge, would be murder. (b). So it seems that if a father were to see a person in the act of committing an unnatural offence with his son, and were instantly to kill him, it would be only manslaughter; but if he only hear of it from others, and go in search of the person afterwards, and kill him, when there had been time for the blood to cool, it would be murder.' (c)

Upon an indictment for murder, Rolfe, B., in summing up, said, 'To take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder.' (d)

In one case, in which a man was charged with wilful murder of his son-in-law, who had assaulted the prisoner's daughter in his presence in a violent manner, although not in a manner to endanger life, Cockburn, C. J., seemed to think that the offence might be

(x) Wild's case, 2 Lew. 214. Alderson, B.

(y) Hinchcliffe's case, 1 Lew. 161, Holroyd, J.

(z) Pearson's case, 2 Lew. 216, Parke, B.

(a) Manning's case, T. Raym. 212. 1 Ventr. 159. And the Court directed the

burning in the hand to be inflicted gently, because there could not be a greater provocation. See *R. v. Kelly*, 2 C. & K. 814.<sup>1</sup>

(b) *Post*, p. 54.

(c) *R. v. Fisher*, 8 C. & P. 182. J. A. Park, J., Parke, B., and Law Recorder.

(d) *R. v. Kelly*, 2 C. & K. 814.

#### AMERICAN NOTE.

<sup>1</sup> *McWhirt's case*, 3 Grat. 594; 46 Am. D. 196. *Mahe v. P.*, 10 Mich. 212; 81 Am. D. 781. *S. v. Ivory*, 64 N. C. 608. It has been said in America that the adulterer when attacked by the husband ought to fly, and not attempt to save his own life by killing

the husband. *Drysdale v. S.*, 83 Ga. 744, 20 Am. St. 340. But on the other hand it is said that his killing the husband, if the husband is trying to kill him, will only amount to manslaughter. *Reed v. S.*, 11 Tex. Ap. 509; 40 Am. R. 796.

reduced to manslaughter, and the prisoner was found guilty of that offence only. (e)

The prisoner was indicted for the wilful murder of his wife. Words had passed between them. He took a knife, and in a struggle stabbed her. For the defence, witnesses were called to shew that the wife had been in the habit of making violent attacks upon her husband, seizing him by the neckerchief and twisting it tight so as almost to strangle him, and cause the bystanders to interfere; and also that the prisoner had abscesses on his neck, which would render him particularly sensitive to such assaults. Byles, J., after consulting Bramwell, B., admitted the evidence, but said that the evidence must be confined to explaining the nature of this particular attack. (f)

It seems, therefore, that it may be laid down, that in all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or to do some great bodily harm, such homicide will be murder. Accordingly, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, and running away, the boy was dragged on the ground till his shoulder was broken, whereof he died; it was ruled murder: for it was not only an illegal, but a deliberate and dangerous act; the correction was excessive and savoured of cruelty. (g)

**Provocation no defence where express malice.** — It should be further remembered, upon the grounds which have been before mentioned, (h) that the plea of provocation will not avail where *express malice* is proved. (i)

The prisoner, with the deceased, who was his brother, and some neighbours, were drinking in a friendly manner at a public-house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgels by agreement. All this time no token of anger appeared on either side, till the prisoner in the cudgel-play gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest: but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, 'Damnation seize me if I do not fetch something, and stick him!' And being reproved for using such expressions, he answered, 'I'll be damned to all eternity if I do not fetch something and run him through the body!' The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel

(e) R. v. Harrington, 10 Cox, C. C. 370. W. Jones, 198. 1 Hale, 453. Kel. 127.  
 (f) R. v. Hopkins, 10 Cox, C. C. 229. 1 East, P. C. c. 5, s. 22, p. 287. Fost. 292.  
 (g) Hallowsay's case, Cro. Car. 131. (h) *Ande*, p. 3.  
 Palm. 545. 1 Hawk. P. C. c. 39, s. 42. (i) See R. v. Sattler, D. & B., C. C. 525.



in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him into the company; but the prisoner answered, 'I will not come in.' 'Why will you not?' said the deceased. The prisoner replied, 'Perhaps you will fall on me and beat me.' The deceased assured him he would not; and added, 'Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me.' The prisoner answered, 'I am not afraid to do so, if you will keep off your fists.' Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, 'Damn you, stand off, or I'll stab you;' and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward towards the deceased and stabbed him to the heart, and he instantly died. The judges unanimously agreed, that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him*? Every circumstance in the case shewed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon: but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off: but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second: but he advanced as fast, and took the revenge he had vowed. The circumstance of the blows before the sword was produced, which probably occasioned the doubt, did not alter the case, nor did the precedent quarrel; because, all circumstances considered, he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed: and the blows were plainly a provocation sought on his part, that he might execute the wicked purpose of his heart with some colour of excuse. (*j*)

In the foregoing case it was considered that the blows with the cudgel were a provocation sought by the prisoner, to give occasion and pretence for the dreadful vengeance which he meditated: and it should be observed, that where the provocation is sought by the party killing, and induced by his own act, in order to afford him a pretence for wreaking his malice, it will in no case be of any avail. (*k*) Thus where A. and B. having fallen out, A. said he

(*j*) Mason's case, Fost. 132. 1 East, (k) 1 East, P. C. c. 5, s. 23, p. 239.  
P. C. c. 5, s. 23, p. 239.

would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. killed him, it was held to be murder. (*l*) So where A. and B. were at some difference; A. bade B. take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.: B. accordingly took out the pin, and A. struck him and killed him; and this was ruled murder: first, because it was no provocation when B. did it by the consent of A.; and, secondly, because it appeared to be a malicious and deliberate artifice, by which to take occasion to kill B. (*m*)

Where upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that some words passed between the prisoner and a third person, after which he walked up and down the passage of the house with a sword-stick in his hand, with the blade open, and was heard to say, 'If any man strikes me I will make him repent it.' He was desired to put up the stick, which he refused to do; and shortly after the prosecutor, ignorant of what had occurred, but perceiving the prisoner was creating a disturbance, struck the prisoner twice with his fist, when the prisoner stabbed him; Parke, B., told the jury, 'If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation; for anger is a passion to which good and bad men are both subject. But the law requires two things: first, that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation. (*n*) There is no doubt here, but that a violent assault was committed; but the question is, whether the blow given by the prisoner was produced by the passion of anger excited by that assault? If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which the law terms "malice," in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder. And so, if you find that before the stroke is given, there is a determination to punish any man, who gives a blow, with such an instrument as the one which the prisoner used: because if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such wound to the passion of anger excited by that blow; for no man who was under proper feelings, none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument.' (*o*)

On a trial for murder, where deceased died from a stab given by the prisoner, in a contest with the deceased, Bosanquet, J., told

(*l*) 1 Hawk. P. C. c. 31, s. 24.

(*m*) 1 Hale, 456.

(*n*) R. v. Kirkham, 8 C. & P. 115, per

Coleridge, J., S. P. 1. R. v. Eagle, 2 F. & F. 827.

(*o*) R. v. Thomas, 7 C. & P. 817, Parke, B.

the jury, 'The question for you, on a careful consideration of the whole evidence, will be, whether the prisoner was guilty of either murder or manslaughter, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or manslaughter, or whether his act was justifiable or excusable: upon the question of whether it amounts to murder you have to consider this; did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? For if he did, it will amount to murder. But if he did not enter into the contest with an intention of using it, then the question will be, did he use it in the heat of passion in consequence of an attack made upon him? If he did, then it will be manslaughter. But there is another question, did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he will be justified.' (p)

On an indictment for murder it appeared that the prisoner and his wife, who had been to look for him, came home about midnight: he was not sober, and she upbraided him for staying out so late: he took some money out, and she said he could treat other persons and not her; he then took down a sword from a shelf, pulled it out of the sheath, and struck her on the back with the flat part of it; her daughter ran to the door; the mother attempted to follow her, and her daughter took hold of her hand to pull her through; the father, according to the daughter's first account, went to his wife at the door, and ran the sword into her left side; but it appeared that she could not see the actual thrust: a wound nine inches long was found in the left side which caused the death. She stated in her husband's presence that he had done it with a sword. The authorities cited *ante*, p. 2, having been referred to; Cresswell, J., after referring to them, said, 'This is expressed more intelligibly by Littledale, J., who says that "malice, in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse." (q) Therefore if you think the prisoner used the weapon wilfully, then that is such malice as the law requires. The great question for your consideration is whether the wound was given wilfully. If done by the accident of the woman rushing on the sword, the prisoner would not be responsible. If you can find any evidence that he used the sword carelessly, and that, without intending to inflict a wound, he caused it, then he is guilty of manslaughter; but if he used it intending to inflict a wound, then he is guilty of murder. When there is a contest the law makes great allowances for blows and a personal encounter, but not for words. (r) If, therefore, in consequence of words, the prisoner was provoked, and intended to do the

(p) R. v. Smith, 8 C. & P. 160. Bosanquet and Coltman, JJ., and Bolland, B.

(q) See this passage in note (i), *ante*, p. 2.

(r) But see *post*, p. 57.

deceased a grievous injury, that is no justification or alleviation of the offence. There is no evidence of any conflict or of any provocation in law. If the prisoner used the sword intending to do a serious injury, that is such evidence of malice as the law holds to be murder. If the deceased rushed upon it, then it was an accident, and he is not guilty. If the wound was inflicted in a struggle without any intention on the part of the prisoner to use it, then there was such a careless use of it as to make him guilty of manslaughter.' (s)

Provocation will not avail if there is time for cooling. — It must be further observed also, that in every case of homicide upon provocation, how great soever that provocation may have been, if there be sufficient time for passion to subside and reason to interpose, such homicide will be murder. (t) Therefore, in the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately, and upon revenge after the fact and sufficient cooling time, it would undoubtedly be murder. (u) 'For let it be observed, that in all possible cases, deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of a nature, for which the laws of society will give him an adequate remedy, thither he ought to resort: but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High.' (v) With respect to the interval of time which shall be allowed for passion to subside, it has been observed that it is much more easy to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. (w) In cases of this kind the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if from any circumstance whatever it appear that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if in legal presumption there was time or opportunity for cooling; the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty. (x) It was at one time held that the question whether the blood has had time to cool or not was a question for the Court and not for the jury. (y)

(s) *R. v. Noon*, 6 Cox, C. C. 137.<sup>1</sup>

(t) *Fost.* 296.

(u) *Fost.* 296. 1 East, P. C. c. 5, s. 20, p. 234, and s. 30, p. 251. See *ante*, p. 49, and *R. v. Fisher*, note (c), p. 49.

(v) *Fost.* 296. Rom. chap. xii. v. 19.

(w) 1 East, P. C. c. 5, s. 30, p. 251.

(x) *Oneby's case*, 2 Lord Raym. 1485.<sup>2</sup>

(y) *R. v. Fisher*, 8 C. & P. 182, J. A. Park, J., Parke, B., and Law Recorder. See *quære*, and see the following cases.<sup>3</sup>

#### AMERICAN NOTES.

<sup>1</sup> And see Bishop, ii. s. 681, "If the deadly weapon is employed neither with direct aim nor in a manner likely to be deadly in the particular instance, it is not to be legally regarded therein as deadly," referring to *S. v. Roane*, 2 Dev. 58. *S. v. West*, 6 Jones, N. C. 505. See also *S. v. Smith*, 2 Strob. 77; 47 Am. D. 589. *Price v. S.*, 36 Miss. 531. *S. v. Hildreth*, 9 Ired. (N. C.) 429.

<sup>2</sup> See *S. v. McCants*, 1 Spears, 334; *C. v. Green*, 1 Ashm. 289. Bishop, ii. s. 673.

<sup>3</sup> It would seem that the better opinion in America is that the question whether there has been sufficient time for the passion to cool is one for the jury. Bishop, ii. s. 711, but see *S. v. McCants*, *supra*, and *S. v. Moore*, 69 N. C. 267.

Under an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public-house till about twelve o'clock at night; about one they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and on a policeman coming, went away; he, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen: the knife, a common bread-and-cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was rather weak in his intellect, but not so much so as not to know right from wrong. Lord Tenterden, C. J., 'It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter; but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent; the witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain; the prisoner may have been absent less than five minutes; there is no evidence that he went anywhere for the knife. The father says it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other; if there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder.' (2)

The prisoner and the deceased, who were strangers, met at a public-house with others, and sat there drinking and wrangling until midnight, when they were all turned out. In consequence of some trivial quarrel about a game, the deceased struck the prisoner a blow on the face with his open hand, saying, 'that if he did not like it he might return it.' The prisoner said he was not in a fit state to fight, and the men stood wrangling some interval of time, which was described by some of the witnesses as 'about ten minutes.' Then the two men shook hands and parted, the prisoner going towards home.

(2) *R. v. Lynch*, 5 C. & P. 324.

When he had gone about thirty yards he stopped, turned round, and cried out, 'Now I am on the highway; if anybody wants anything I am ready for him.' The deceased appeared to have taken this as a kind of challenge to himself, and at all events accepted it as such, and went after the prisoner, who had stood still. Almost immediately afterwards the deceased was heard to cry out, 'I am stabbed,' and was found lying on the ground, his jacket off, and in the hands of the prisoner who was standing by; and a mortal wound in his abdomen, which was no doubt inflicted by the prisoner, who said, 'I should n't have done it if he had n't hit me on the face.' When the dying deposition of deceased was taken, he declared that on the second occasion he had not struck the prisoner; and when the prisoner said to him, 'Did n't you knock me down?' the dying man denied it. Hannen, J., in the course of his summing up to the jury, said, 'In the present instance the evidence as to the time which had elapsed is left in some uncertainty; but several witnesses say it was "about ten minutes." It is for you to form your own conclusion as to what took place in the interval, as to which you can only draw inferences from the circumstances; and though there is no express evidence of a renewal of the aggression on the part of the deceased (and the evidence is rather against the supposition, especially as the prisoner did not accuse him of it at the time), it is beyond a doubt that he followed the prisoner with the intention of renewing the attack, and his jacket was found off. It is for you to draw such inferences from this as you think warranted by the evidence. If you come to the conclusion that the prisoner, after the blow had been given, had time for his blood to cool, and that when he stopped on the road he had the intention in his mind to use the knife in the event of the deceased following him, and uttered the words he used with the object of inducing the deceased to follow him, there would be evidence of implied malice to sustain the charge of murder. But if you come to the conclusion that the prisoner had not such intention in his mind, and that he did not utter the words with such intention, that they were idle words of bravado, not of challenge, and that he used the knife on some fresh and sudden provocation, ensuing from the deceased following him and renewing the assault upon him, then there is evidence to reduce the crime to manslaughter.' (a)

The deceased was requested by his mother to turn the prisoner out of her house, which after a short struggle with the prisoner he effected, and in doing so he gave him one kick. The prisoner said he would make him remember it, and instantly went to his own lodgings, from two to three hundred yards distant, passed through his bedroom and a kitchen into a pantry, and returned thence hastily back again. Within five minutes after the prisoner had left the deceased, the latter followed him to give him back his hat, which had been left behind, and they met about ten yards from the prisoner's lodgings. They stopped for a short time, when they were heard talking together, but without any words of anger; after they had walked on together for about fifteen yards, the deceased gave the prisoner his hat, when the latter exclaimed with an oath, that he would have his rights, and instantly stabbed the deceased with a

(a) *R. v. Selten*, 11 Cox, C. C. 674.

knife or some sharp instrument, in two places, giving him a mortal wound in the belly. As soon as he had stabbed him the second time, he said he had served him right, and instantly ran back to his lodgings, passed hastily through his bedroom and the kitchen to the pantry, and thence back to his bedroom, where he undressed himself and went to bed. Shortly afterwards he was apprehended, and no knife or other instrument found upon him. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate, and which was kept on a shelf with his meat; and in another part of the pantry three other knives of a similar description, which he used in his business of a butcher. The several knives were found the next morning in their usual places in the pantry. Tindal, C. J., told the jury that the question for them was, whether the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding: or whether there had been time for the blood to cool, and for reason to resume its seat, before the wound was given. That in determining this question, the most favourable circumstance for the prisoner was the shortness of time between the original quarrel and the stabbing; but, on the other hand, the weapon was not at hand when the quarrel took place, but was sought for from a distant place. It would be for them to say whether the prisoner had shewn thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion. (b)

From the cases which have been stated in the former part of this section, it appears that malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature; for the law supposes that a party capable of acting in so outrageous a manner upon a slight provocation must have entertained a general, if not a particular malice, and have previously determined to inflict such vengeance upon any pretence that offered. (c)

## SEC. VII.

### *Cases of Mutual Combat.*<sup>1</sup>

Where words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important inquiry will be, whether the occasion was altogether sudden, and not the result of preconceived anger or malice; for in no case will the

(b) *R. v. Hayward*, 6 C. & P. 157, Tindal, C. J.

(c) 1 East, P. C. c. 5, s. 30, p. 252.

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#### AMERICAN NOTE.

<sup>1</sup> In America there are statutes against duelling in some of the States. Bishop, ii. s. 316. See also *U. S. v. Mingo*, 2 Curtis,

C. C. 1. *S. v. Underwood*, 57 Mo. 40. *Sann v. S.*, 30 Ga. 67.

killing, though in mutual combat, admit of alleviation, if the fighting were upon malice. (*d*)

Thus a party killing another in a deliberate duel is guilty of murder; for wherever two persons in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, (*e*) and cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his intent only to vindicate his reputation; (*f*) or that he meant not to kill, but only to disarm his adversary. (*g*) He has deliberately engaged in an act, highly unlawful, in defiance of the laws, and he must at his peril abide the consequences; and upon this principle, wherever two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder. (*h*) And in a case where, upon a quarrel happening at a tavern, Lord Morley objected to fighting at that time, on account of the disadvantage he should have by reason of the height of his shoes, and presently afterwards went into a field and fought, the circumstance was relied on as shewing that he did not fight in the first passion. (*i*) So wherever there is an act of deliberation, and a meeting by compact, such mutual combat will not excuse the party killing from the guilt of murder; as where B. challenged A., and A. refused to meet him, but in order to evade the law, told B. that he should go the next day to a certain town about his business, and accordingly B. met him the next day in the road to the same town and assaulted him, whereupon they fought, and A. killed B., it is said that A. seems guilty of murder; but the same conclusion would not follow, if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting. (*j*) Upon the same principle, if A. and B. meet deliberately to fight, and A. strike B., and pursue B. so closely that B., in safeguard of his own life, kills A., this is murder in B.; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done. (*k*)

(*d*) 1 East, P. C. c. 5, s. 24, p. 241.

(*e*) R. v. Young, 8 C. & P. 644, Vaughan, J., and Alderson, B. R. v. Cuddy, 1 C. & K. 210. Baronet's case, 1 E. & B. 1.

(*f*) As where he had been threatened that he should be posted for a coward. 1 Hale, 452, and see R. v. Rice, 3 East, R. 581.

(*g*) 1 Hawk. P. C. c. 81, s. 21.

(*h*) 1 Hawk. P. C. c. 31, s. 22. 1 Hale, 453.

(*i*) Bromwich's case, 1 Lev. 180. 1 Sid. 277. 7 St. Tr. 42. Bromwich was indicted for aiding and abetting Lord Morley in the murder of Hastings.

(*j*) 1 Hawk. P. C. c. 81, s. 25.

(*k*) 1 Hale, 452, 480, who says, 'Thus is Mr. Dalton, cap. 93, p. 241, (new edit. c. 145, p. 471) to be understood.' But a *qu.* is added in 1 Hale, 452, whether if B. had really and

truly declined the fight, ran away as far as he could, and offered to yield, and yet A., refusing to decline it, had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it would be murder. This *quære* of Lord Hale is discussed in 1 East, P. C. c. 5, s. 54, p. 284, *et seq.*, and it is observed that Blackstone (4 Blac. Com. 185), expressly puts the same case of a duel as Lord Hale, but without subjoining the same doubt; and that it was considered as settled law by the chief justice in Oney's case. (Lord Raym. 1489.) Mr. East, after reasoning in favour of the extenuation of the crime of the duellist so declin-



And the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his second, is guilty of murder; (*l*) and it has been held that the second also of the person killed is equally guilty by reason of the countenance given to the principal, and of the compact; but this was considered as a severe construction by Lord Hale, who thought that the law in that case was too far strained. (*m*) It is now, however, settled that the seconds of both are guilty of murder. (*n*) Where, therefore, an indictment charged Monro with the murder of Fawcett and the prisoner as present, aiding and assisting in the murder, and the death was shewn to have occurred in a duel, in which Monro was one of the principals and the prisoner was said to have acted as second to the deceased; the jury were told, as a matter about which no judge entertained any doubt, that where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting the death, will be guilty of abetting the principal offender, and that, without giving them any particular name, all persons who are present aiding, assisting, and abetting that deliberate duel are within the terms of such an indictment as this. (*o*)

With regard to other persons who are present at a premeditated duel, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence is not sufficient; but if they sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present and assisting and encouraging at the moment when the pistol is fired, they are guilty of murder. (*p*)

If, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight, and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled. (*q*) And it must be observed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not

ing to fight, proceeds thus: 'Yet still it may be doubtful whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon, in defiance of the law.' 1 East, P. C. c. 5, s. 54, p. 285.

(*l*) 1 Hale, 442, 452. 1 Hawk. P. C. c. 31, s. 31. R. v. Young, 8 C. & P. 644.<sup>1</sup>

(*m*) 1 Hale, 442, where he says that the

book of 22 E. 3. Coron. 262, was relied upon: but, as he thinks, the law was too far strained in that case; and in page 452 he says, 'some have thought it to be murder also in the second of the party killed, because done by compact and agreement. 22 Edw. 3, 262. *Sed quæ de hoc.*'

(*n*) R. v. Young, 8 C. & P. 644, Vaughan, J., and Alderson, B. R. v. Cuddy, 1 C. & K. 210, Williams, J., and Rolfe, B.

(*o*) R. v. Cuddy, *supra*.

(*p*) R. v. Young, *supra*.

(*q*) 1 Hale, 453. 1 Hawk. P. C. c. 31, s. 29. 3 Inst. 51.

#### AMERICAN NOTE.

<sup>1</sup> In America, it has been held that the surgeon who is present at a duel is guilty of murder. Cullen v. C., 22 Grat. 624.

heard : therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence. (r)

Sir Charles Pym with one party, and Mr. Walters with another party, dined at a tavern ; and on coming out Sir Charles and Mr. W. quarrelled and drew their swords, and Mr. W. ran Sir Charles through the body, and he died. There was no evidence of any unfair advantage taken by Mr. W. ; nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through Sir Charles's body ; and it appeared that the parties did not know each other before. When Sir Charles fell, Mr. W. took him by the nape of the neck, dashed his head upon the ground, and said, 'Damn you, you are dead !' Jenner, B., told the jury that this was only manslaughter : the jury, however, were disposed to find it murder, because of the dashing the head against the ground, &c. : but Allibone, J., repeated to them that it was manslaughter only, and they found accordingly. (s)

Lord Byron and Mr. Chaworth differed at a club as to the best means of procuring game. Mr. C. mentioned Sir C. Sedley's manors ; Lord B. asked which they were ; Mr. C. named Nuttall and another ; Lord B. repeated his question : Mr. C. said, 'Surely you will allow Nuttall to be Sir C. Sedley's : but if you have anything more to say, you will find Sir C. Sedley in Dean Street, and me in Berkeley Row.' The conversation then dropped, and they stayed together at least half an hour ; and Lord B. during that time conversed with a gentleman who sat next him : Mr. C. settled the bill, but made a mistake in marking the club-room, which might arise from agitation ; he marked Lord B. as absent, though he was there. Mr. C. then went out, and a Mr. Donston followed him, of whom Mr. C. asked if he had been short with Lord B. in what he said last to him ; to which Mr. Donston answered, 'No,' and was returning into the room, when he met Lord B. coming out. Lord B. said to Mr. C., 'I want to speak to you ;' upon which they both called the waiter, and were shewn into a small room, and the waiter left a candle in the room. Lord B. asked Mr. C. if he meant the conversation upon game to Sir C. Sedley or to him ; upon which Mr. C. said, 'If you have anything to say we had better shut the door, or we shall be heard,' and he shut the door. On turning from the door he saw Lord B.'s sword half drawn, and Lord B. said, 'Draw, draw !' Mr. C. drew, and thrust at Lord B. ; and after one or two thrusts, Mr. C. received a mortal wound, of which he died. An indictment was preferred for murder ; but upon the trial the peers (123) were unanimous that it was manslaughter only. (t)

The deceased, who was a French prisoner, had stolen a tobacco-box from one of a party of French prisoners who were gambling, and was chastised by some of the party for his conduct, and a clamour was raised against him. As he passed the prisoner, who was sitting at a table and much intoxicated, the prisoner got up, and with great force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his doubled fist in the face, and one blow in the eye ; upon which the

(r) *Fost.* 138, 296.

(t) *R. v. Lord Byron*, 11 St. Tr. 1117.

(s) *R. v. Walters*, 12 St. Tr. 113.

prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay on his back upon the ground, two or three stamps with great force with his right foot on the stomach and belly; and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick in the face; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by heat of blood: but the learned judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it for that purpose, and the judges were of opinion that it was only a case of manslaughter. (u)

A. uses provoking language or behaviour towards B., and B. strikes him, upon which a combat ensues, in which A. is killed, this is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow. (v)

Yet in cases of this kind the law may come to the conclusion of malice, if the party killing began the attack with circumstances of undue advantage. (w) For in order to save the party making the first assault, upon an insufficient local provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defence; at least at the onset: and this more particularly where the attack is made with deadly or dangerous weapons. (x)

Thus if B. draw his sword and make a pass at A., the sword of A. being then undrawn, and thereupon A. draw his sword and a combat ensue, in which A. is killed, this will be murder; for B., by making the pass, while his adversary's sword was undrawn, shews that he sought his blood: and A.'s endeavour to defend himself, which he had a right to do, will not excuse B.; (y) but if B. had forbore till his adversary had drawn too it had been no more than manslaughter. (z)

In *Mawgridge's case*, words of anger happening, Mawgridge threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge, and wounded him; whereupon Mawgridge stabbed Mr. Cope. This was ruled to be murder; for Mawgridge, in throwing the bottle, shewed an intention to do some great mischief; and his drawing immediately shewed that he intended to follow his blow; and it was lawful for Mr. Cope, being so assaulted, to return the bottle. (a)

(u) *R. v. Ayes*, MS. Bayley, J., and R. & R. 166.

(v) *Fost.* 295. 1 Hale, 456.

(w) *Fost.* 295.<sup>1</sup>

(x) 1 East, P. C. c. 5, s. 25, p. 242.

(y) *Fost.* 295. 1 Hawk. P. C. c. 31, s. 27.

(z) 1 Hawk. P. C. c. 31, s. 28. *Fost.* 295.

(a) *R. v. Mogridge*, Kel. 128, 129, cited in *Fost.* 295, 296, where it is said that the judgment in this case was holden to be good law by all the judges of England, at a conference in the case of Major Oneby, 2 Lord Raym. 1485. 2 Stra. 766.

#### AMERICAN NOTE.

<sup>1</sup> See *S. v. Hildreth*, 9 Ired. (N. C.) 429.

Even if the parties are upon an equal footing when the combat begins, malice may be implied from the violent conduct which the party killing pursued in the first instance; more especially where there is time for cooling, and such expressions are used as manifest deliberation; as in the following case of Major Oneby:—

Major Oneby was indicted for the murder of Mr. Gower; and a special verdict was found, containing the following statement. The prisoner being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time, began playing at hazard; when Rich, one of the company, asked if any one would set him three half-crowns; whereupon the deceased, in a jocular manner, laid down three halfpence, telling Rich he had set him three pieces; and the prisoner at the same time set Rich three half-crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set halfpence, and that he was an impertinent puppy for so doing, to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head; but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased in return immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, 'We have had hot words, but you were the aggressor; but I think we may pass it over;' and at the same time offered his hand to the prisoner, who made answer, 'No, damn you; I will have your blood.' After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, 'Young man! come back; I have something to say to you;' whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked upon his death-bed, whether he received his wound in a manner among sword-men called fair, answered, 'I think I did.' It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the judges were of opinion that the prisoner was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should probably be taken, upon the facts found in the verdict and the argument of the Chief Justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under those circum-

stances the Court were of opinion that the prisoner had had reasonable time for cooling; after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remaining in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether shewed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances; for it must have been implied, according to *Mawgridge's case*, that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of Mr. Gower, made a deadly assault upon him. (b)

If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter. But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon; or if, at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon; the killing in both these cases will be murder. The prisoner and Levy quarrelled and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places; and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner; who had a clasped knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning; or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder. (c)

Upon an indictment for maliciously cutting, it appeared that the prisoner had cut the prosecutor in a fight that took place between them, but no instrument was seen either before or at the time in the prisoner's hands; Bayley, J., 'When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into

(b) *R. v. Oneby*, 2 Str. 766. 2 Lord Raym. 1485.

(c) *R. v. Anderson*, O. B. December, 1816. Richards, B., and the Recorder, thought the

direction right. *MS. Bayley, J. See R. v. Kessal*, 1 C. & P. 437, 1 East, P. C. c. 5, s. 26, p. 243.

a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. If you are of opinion that the prisoner entered into the contest, being unduly armed with an instrument calculated to produce the effects charged in the indictment, and with the instrument ready in his hand, in order that he might resort to it with any of the alleged intents, then he is guilty. For if death had ensued it would have been murder.' (d)

John Taylor, a Scotch soldier, and two other Scotchmen, were drinking together in an alehouse, when some servants to the owner of the house, who were also drinking in another box, abused the Scotch nation, and used several provoking expressions towards Taylor and his company, on which Taylor struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist; the servant who was struck went out of the room into the yard, to fetch his fellow-servants to turn Taylor and his company out of the room; and, in the meantime, an altercation ensued between Taylor and the deceased, who was the owner of the house, but not the occupier, and who had come into the room after the servant went into the yard. He insisted that Taylor should pay for his liquor and go out of the house; and Taylor, after some further altercation, was going away, when the deceased laid hold of him by the collar, and said, 'He should not go away till he had paid for the liquor;' and then threw him down against a settle. Taylor then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage; and Taylor then said, 'That he did not mind killing an Englishman more than eating a mess of crowdy.' The servant, who had been originally struck with the cane, then came and assisted the deceased, who had hold of Taylor's collar; and together they violently pushed him out of the door of the alehouse; whereupon Taylor instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter.(e)

The prisoner, a shoemaker, lived near the deceased. One afternoon the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house; and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased having finished his thatching, was returning, in his way home, by the prisoner's house; and on passing the prisoner, as he sat on the bench, the deceased called out to him, 'Are not you an aggravating rascal?' The prisoner replied,

(d) *Whiteley's case*, 1 Lew. 173, Bayley, J. 1 East, P. C. c. 5, s. 26, p. 243.

(e) *R. v. Taylor*, 5 Burr. 2793. 1 Hawk. P. C. c. 31, s. 39.

‘What will you be, when you are got from your master’s feet?’ On which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were struggling and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, ‘You rogue, what do you do with that knife in your hand?’ and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, ‘The rogue has stabbed me to the heart; I am a dead man;’ and expired. Upon inspection, it appeared that he had received three wounds, one very small on the right breast; another on the left thigh, two inches deep, and half an inch wide; and the mortal wound on the left breast. After great argument and consideration, the judges determined that the offence was only manslaughter. (f)

It appears that the judges thought in this case, that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that colour, to revenge his former quarrel, by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer’s evening; and when the deceased passed by, neither provoked him by word nor gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat, and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders; though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, the judges thought that the offence only amounted to manslaughter; and the prisoner was recommended for a pardon. (g)

Upon an indictment for maliciously cutting, it appeared that a quarrel arose between the prisoner and the prosecutor, both being intoxicated; the prosecutor struck the first blow, and they fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued, and overtook him, on which the prisoner, who had taken out his knife in his retreat, gave the prosecutor a cut across the abdomen. J. A. Park, J., ‘The question I shall leave to the jury is this, whether the prisoner ran back with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so to gain an advantage in the conflict? for if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, I am of opinion that if death had ensued, the crime would have been murder; or whether the prisoner, *bona fide*, ran away from the prosecutor with intention to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself? as in this latter case, if

(f) *R. v. Snow*, 1 Leach, 151.

(g) 1 East, P. C. c. 5, s. 26, p. 245, who cites Serjeant Foster’s MS.

the prosecutor had been killed, the crime would have been manslaughter only.' (h)

It seems to have been considered in one case that the nature of a mutual combat might be such as to render the case one of murder. Upon an indictment for manslaughter the evidence was that the prisoner and deceased were 'fighting up and down,' and that the deceased died of the injury he sustained in the fight. Bayley, J., to the jury, 'Fighting up and down is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of that description it is murder, and not manslaughter.' The prisoner having been convicted, Bayley, J., told him that if he had been charged with murder, the evidence adduced would have sustained the indictment. (i)

Though, where there has been an old quarrel between A. and B., and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, it is murder. (j)

On an indictment for manslaughter it appeared that the prisoner, a blind man, and the deceased were at a public-house, and a dispute arose between them about a bet. The prisoner said he had won, and the deceased refused to pay; the prisoner went to lay hold of him, and the deceased pushed him away; the prisoner went again to lay hold of the deceased, and was again pushed away; they then got hold of each other and there was a struggle, and they pushed about from one side to another; no blows were struck, but there were three falls, and the deceased fell undermost each time, and the third time the prisoner's knees came upon the lower part of the stomach of the deceased, and ruptured the intestines, which rupture caused the death. Patteson, J., told the jury that 'All struggles in anger, whether by fighting, or wrestling, or any other mode — all kinds of contests in anger, are unlawful. And if you think the deceased's death was occasioned by an act of the prisoner in a struggle of that kind, I cannot tell you that it does not amount to manslaughter. If the prisoner was struggling, but did not attempt to throw him, I should tell you it is not a case of manslaughter; but it is for you to say whether that is the fact or not. If the prisoner laid hold of the deceased in anger, and struggled with him and threw him, then it is a case of manslaughter. If you can collect from the circumstances that the prisoner was pulled down against his will, and, in consequence, fell upon the deceased, then he will not be guilty. But there does not seem anything in the evidence to shew that the prisoner evinced any disposition to give up the contest; on the contrary, it appears that the contest was continued till the fall, which occasioned the death. You have been told by the counsel for the prisoner that you must be satisfied that the death was

(h) *R. v. Kessal*, 1 C. & P. 437. *R. v. Taylor*, *supra*, note (e), and *R. v. Snow*, *supra*, note (f), had been cited for the prisoner.

(i) *Thorpe's case*, 1 Lew. 171. 'Fight-

ing up and down' is described in *Roscoe's Cr. E.* 685, as 'a brutal and savage practice in the north of England.'

(j) 1 Hale, 451. 1 Hawk. P. C. c. 31, s. 30.



occasioned by the wilful act of the prisoner. In one sense of the word "wilful" I agree with him. I take it for granted he does not mean by it malicious or intending to do injury, but that it must be an act of the will, and that it must be shewn that the prisoner attempted to throw the deceased. They had no right to struggle in this way; if it had been an amicable contest in wrestling, to see who was the best man, that would be quite a different matter.' (*k*)

It is said, that he shall be adjudged guilty of manslaughter, who, seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other. (*l*) And it seems clear that if a master, maliciously intending to kill another, take his servants with him without acquainting them with his purpose, and meet his adversary, and fight with him, and the servants, seeing their master engaged, take part with him, and kill the other, they would be guilty of manslaughter only, but the master of murder. (*m*) From this it follows, *a fortiori*, that if a man-servant or friend, or even a stranger, coming suddenly, and seeing him fighting with another man, side with him, and kill the other man, or seeing his sword broken send him another, wherewith he kills the other man, such servant, friend, or stranger, will be only guilty of manslaughter. (*n*) But this supposes that the person interfering does not know that the fighting is upon malice; for though if A. and B. fight upon malice, and C., the friend or servant of A., not being acquainted therewith, come in and take part against B., and kill him, this (though murder in A.) is only manslaughter in C.; yet it would be otherwise, if C. had known that the fighting was upon malice, for then it would be murder in both. If A., having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo*; but if the servant had killed him before the master had retreated as far as he could, it would have been manslaughter in the servant. And the law is the same in the case of the master killing the other in defence of the servant. (*o*)

Where Ferdinando Cary and Oseband were in a field fighting upon a quarrel, and Sir M. Cary casually riding by, and seeing them in fight, and his kinsman one of them, rode in, drew his sword, thrust Oseband through and killed him; Coke, C. J., and the rest of the Court agreed that this is clearly but manslaughter in him, and murder in the other; for the one may have malice and the other not; he may come in by chance, and so kill the other. (*p*)

If two persons be fighting, and another interfere with intent to part them, but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter. (*q*) And if a third person should take up the cause of one who has been worsted in mutual

(*k*) R. v. Canniff, 9 C. & P. 359.

(*l*) 1 Hawk. P. C. c. 31, s. 35.

(*m*) 1 Hawk. P. C. c. 31, s. 55. 1 Hale, 438. Plow. Com. 100 b. R. v. Salisbury.

(*n*) 1 Hawk. P. C. c. 31, s. 56. 1 East, P. C. c. 5, s. 58, p. 290.

(*o*) 1 East, P. C. c. 5, s. 58, p. 292, and the authorities there cited. 1 Hale, 484.

So Tremin says that a servant may kill a man to save the life of his master, if he cannot otherwise escape. 21 H. 7, c. 39. Plow. Com. 100. 1 MS. Sum.

(*p*) R. v. Cary, 3 Bulst. 206. S. C. 1 Rolle, R. 407, as R. v. Carew.

(*q*) 1 East, P. C. c. 5, s. 59, p. 292. Kel. 66.

combat, and should attack the conqueror, and be killed by him, the killing would, it seems, be manslaughter. A. and B. were walking together in Fleet-street, and B. gave some provoking language to A., who, thereupon, gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards; and C. pursuing him, A. drew his sword, made a pass at C., and killed him. A. being indicted for murder, the Court directed the jury to find it manslaughter, not murder, because it was upon a sudden falling out, not *se defendendo*, partly because A. made the first breach of the peace by striking B.; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C., than to avoid him; and accordingly, at last, it was found manslaughter. (r)

Where upon an indictment for wounding under the 9 Geo. 4, c. 31, it appeared that the prisoner and the prosecutor's brother were fighting, and the prosecutor laid hold of the prisoner in order to prevent him from beating his brother, and held him down on a locker, but did not strike him, and the prisoner then stabbed him; the jury were directed, that if they were of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime, if death had ensued, would have been murder; but if they thought that the prosecutor did more than was necessary to prevent the prisoner from beating the brother, or that he struck any blows, then it would have been manslaughter. (s)

A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; and this was held manslaughter, because it happened upon a sudden motion in revenge of his friend. (t) But it must be intended that the two men who fell out were actually fighting together at the time; for if words only had passed between them, it would have been murder; nothing but an open affray of striving being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter, if a man be killed by the person so meddling. (u)

Though Lord Hale and others appear sometimes to intimate a distinction between the interference of servants and friends, and that of a mere stranger, yet the limits between them do not appear to be anywhere actually defined. And it has been observed, that the nearer or more remote connection of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which induced the interference,

(r) 1 Hale, 482, 483. A case at Newgate, 1671.

(s) R. v. Bourne, 5 C. & P. 120, J. A. Park, J.

(t) 12 Rep. 87.

(u) See the opinion of the judges in R. v. Huggett, Kel. 59, and 1 East, P. C. c. 5, s. 89, pp. 328, 329.

than as furnishing any precise rule of law grounded on such a distinction. (v)

As a blow aimed with malice at one individual, and by mistake or accident falling upon another and killing him, will amount to murder; (w) so if a blow intended against A. and lighting on B. arose from such a sudden transport of passion as, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it should happen to kill B. (x)

A widow finding that one of her sons had not prepared her dinner as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a passion, and she took up a small piece of iron used as a poker, intending to frighten him, and seeing she was very angry he ran towards the door of the room, when she threw the poker at him, and it happened that the deceased was just coming in at the moment, and the iron struck him on the head, and caused his death; J. A. Park, J., told the jury, 'No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully — and this was undoubtedly unlawful, as an improper mode of correction — and strikes another and kills him, it is manslaughter, and there is no doubt, if the child at whom the blow was aimed had been struck, and died, it would have been manslaughter, and so it is under the present circumstances.' (y)

A quarrel arose between some soldiers and a number of keelmen at Sandgate; and a violent affray ensuing, one of the soldiers was stripped, and a party of five or six came up and beat him cruelly. A woman called out from a window, 'You rogues, you will murder the man!' The prisoner, who was a soldier, had before driven part of the mob down the street with his sword in the scabbard; and on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying, he would sweep the street; and, on their pressing on him, he struck at them with the flat side of the sword several times; upon which they fled, and he pursued them. The soldier who was stripped got up, and ran into a passage to save himself. The prisoner returned, and asked if they had murdered his comrade; and the people came back, and assaulted him several times, and then ran from him. He sometimes brandished his sword; and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier; but, before he passed, the soldier went to him and struck him on the head with his sword, of which blow he almost immediately expired. It was the opinion of two witnesses that, if the soldier had not drawn his sword, they would both of them have been murdered. The judges were clearly of opinion that this was only manslaughter. (z)

(v) 1 East, P. C. c. 5, s. 58, p. 292.

(w) *Post*, p. 121.

(x) *Fost*. 262.

(y) *R. v. Conner*, 7 C. & P. 488, J. A. Park and Gaselee, JJ.

(z) *Brown's case*, 1 Leach, 148. 1 East, P. C. c. 5, s. 27, pp. 245, 246.

## SEC. VIII.

*Cases of Resistance to Officers of Justice, to Persons acting in their Aid, and to Private Persons lawfully interfering to Apprehend Felons, or to Prevent a Breach of the Peace.*

**Resisting and killing officers.** — Ministers of justice, as bailiffs, constables, watchmen, &c., (*a*) while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political justice; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom. If, therefore, upon an affray, the constable, and others in his assistance, come to suppress the affray and preserve the peace, and in executing their office the constable or any of the assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and, therefore, the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm; so if the sheriff, or any of his bailiffs, or other officers, is killed in executing the process of the law, or in doing their duty, it is murder; the same is the law as to a watchman who is killed in the execution of his office. (*b*) This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo, morando, et redeundo*; and therefore if he come to do his office, and meeting with great opposition, retire, and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And, upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty (which is a fact to be collected from circumstances appearing in evidence), this likewise will amount to murder. (*c*)<sup>1</sup>

**Special constables.** — A special constable, duly appointed under the 1 & 2 Will. 4, c. 41, remains a constable until his services are

(*a*) 1 Hale, 456, 460. 4 Co. 40.

(*b*) Case of Appeals and Indictments, 4 Co. 40. As to the authority for acting, and

the exercise of that authority in a proper manner, see *post*, p. 73.

(*c*) Fost. 308, 309.

## AMERICAN NOTE.

<sup>1</sup> In America any person who sees a felony about to be committed may prevent it, and if he is killed while so doing it is murder. Dill v. S., 25 Ala. 15.

either determined or suspended under sec. 9. Upon an indictment for the murder of J. Nutt, it appeared that Nutt was appointed on the 9th of February, 1832, by two justices, in writing, and under their hands, 'to act as a special constable for the parish of St. George, until he received notice that his service was suspended or determined.' Nutt was killed in conveying a prisoner to the station-house on the 16th of August, 1840; it was objected that Nutt did not continue a special constable till that time; but it was held that the appointment was indefinite in point of time, and remained valid and in force till it was either suspended or determined under sec. 9, and as Nutt's appointment was not shewn to have been determined, he continued to be a special constable under the Act on the 16th of August, 1840, and had then, under sec. 5, all the ordinary powers of a common constable. (*d*)

**Policemen.** — A policeman is entitled to the same protection in the execution of his duty as a constable, and if he is killed in the execution of his duty it will be murder. By the Prisons Act, 1877 (40 & 41 Vict. c. 21), s. 28, 'A prisoner shall be deemed to be in legal custody whenever he is being taken to or from, or whenever he is confined in any prison in which he may be lawfully confined, or whenever he is working outside, or is otherwise beyond the walls of any such prison in the custody or under the control of a prison officer belonging to such prison; and any constable or other officer acting under the order of any justice of the peace or magistrate having power to commit a prisoner to prison, may convey a prisoner to or from any prison to or from which he may be legally committed or removed, notwithstanding such prison may be beyond the constableness or other jurisdiction of such constable or officer, in the same manner and with the same incidents as if such prison were within such constableness or other jurisdiction.' Where, therefore, a policeman between eleven and twelve o'clock at night was called upon to clear a beer-house, which he did, and then went into the street where the prisoner and many others were standing near the door, when the prisoner refused to go home, and used very abusive and violent language, and the policeman laid his hand on his shoulder gently, and told him to go away, on which the prisoner immediately stabbed him with a knife in the throat; it was held that if the policeman had died, this would have been murder; for if a policeman had heard any noise in the beer-house at such a time of night, he would have acted within the line of his duty, if he had gone in, and insisted that the house should be cleared; and much more so, if he was required by the landlady; and after that was done, if a knot of people remained in the street, and the crowd increased in consequence of their attention being drawn to the clearing of the house, and if anything was saying or doing likely to lead to a breach of the peace, the policeman was not only bound to interfere, but it would have been a breach of his duty if he had not done so, and if in so doing he ordered the people to go away, and any one was unwilling, and defied the policeman, and used threatening language, the policeman was perfectly justified in insisting upon that person going off; and if he had warned him several times, and he would not go away, and used

(*d*) *R. v. Porter*, 9 C. & P. 778. Coleridge, J.

threatening language if any one ventured to touch him, the policeman was entirely justified in using a degree of violence to push him from the place, in order to get him to go home; and therefore anything that he did would not be in the nature of an assault, but would be an act in the discharge of his duty, and therefore any blow that was given afterwards with a cutting instrument would be precisely the same as if it had been given without anything being done by the policeman. (e) So where a policeman saw the prisoner playing the bagpipes in a street at half-past eleven o'clock at night, by which he collected a large crowd around him, among whom were prostitutes and thieves, and the policeman told him he could not be allowed to play at that time of night, and he must go on, but he said he would be damned if he would, and the policeman took hold of him by the shoulder, and slightly pushed him, on which the prisoner wounded him with a razor; it was held, that if the prisoner was collecting a crowd of persons at that time of night, and the policeman desired him to go on, and laid his hand upon his shoulder with that view only, he did not exceed his duty, and if the prisoner then wounded him, it would have been murder if he had died; but if the policeman gave the prisoner a blow and knocked him down, he was not justified in so doing. (f)

**Persons aiding officers of justice.** — The protection which the law affords to such ministers of justice is not, as we have seen, confined to their own persons. Every one coming to their aid, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself. (g) Nor is the protection which the law affords in these cases confined to the ordinary ministers of justice, or their assistants. It extends, under certain limitations, to the cases of private persons interposing for preventing mischief from an affray, or using their endeavours to apprehend felons, or those who have given a dangerous wound, and to bring them to justice: such persons being likewise in the discharge of a duty required of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice. (h) The deceased having been required by a policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death; it was objected that he was not at the time aiding the policeman. Coltman, J., 'He is entitled to protection *eundo, morando, et redeundo*.' (i)

The prisoner was charged with the wilful murder of Joseph Dowfield, who was called upon by a police constable to aid in apprehending the prisoner and another man charged with stealing money.

(e) *R. v. Hema*, 7 C. & P. 312, Williams, J.

(f) *R. v. Hagan*, 8 C. & P. 167, Bolland, B., and Coltman, J.

(g) 1 Hale, 462, 463. Fost. 309.

(h) Fost. 309.

(i) *R. v. Phelps*, C. & M. 180, and MS. C. S. G. See the *Sissinghursthouse case*, *post*, p. 119.

Brett, J., in summing up, said : 'The men had been given into custody of a police constable, who had legal authority to take them into custody, and to call upon others to assist him, and they had no right to resist him, and in resisting him they were doing what was illegal. If the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he is guilty of murder. If the prisoner inflicted the kick in resistance of his lawful arrest, even although he did not intend to inflict grievous injury, he is equally guilty of murder. But if in the course of the struggle he kicked the man, not intending to kick him, then he is only guilty of manslaughter.' (*j*)

If A., being a peace-officer, has a warrant from a proper magistrate for the apprehending of B. by name, upon a charge of felony, and B., though innocent, fly, or turn and resist, and in the struggle or pursuit is killed by A., he will be indemnified ; and, on the other hand, if A. is killed by B., or any of his accomplices joining in that outrage, such killing will be murder. (*k*)

**General rule.** — It may be laid down as a general rule, that where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance ; for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that resistance be made ; and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal ; for under circumstances of resistance, in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle ; while, on the other hand, the persons resisting will be guilty of murder. (*l*) And it has been decided, that if in any quarrel, sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace and suppress the affray, he who kills him will be guilty of murder. (*m*) But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the King's name to keep the peace, or by otherwise shewing that it was not his intention to take part in the quarrel, but to appease it ; (*n*) unless, indeed, he were an officer within his proper district, and known, or generally acknowledged, to bear the office he had assumed. (*o*) As if A., B., and C. be in a tumult together, and D., the constable, come to appease the affray, and A., knowing him to be the constable, kill him, and B. and C., not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C. (*p*) Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder ; and such as did not know it, of manslaughter only. (*q*)

But it must be well remembered, that this protection of the law is

(*j*) R. v. Porter, 12 Cox, C. C. 444. .

(*k*) See Fost. 318.

(*l*) Fost. 270, 271. 1 Hale, 494. 3 Inst. 56. 2 Hale, 117, 118. See R. v. Porter, 12 Cox, C. C. 444.

(*m*) 1 Hawk. P. C. c. 31, s. 48, 54.

(*n*) Fost. 272.

(*o*) 1 Hawk. P. C. c. 31, s. 49, 50.

(*p*) 1 Hale, 438.

(*q*) 1 Hale, 446.

extended only to persons who have authority to arrest or imprison, and who use such authority in a proper manner; and that questions of much nicety and difficulty will often arise upon the points of authority, legality of process, notice, and regularity of proceeding. The consideration of these points will be here attempted.

**Arrest by a private person.** — At common law all private persons are justified, without a warrant, in apprehending and detaining, until they can be carried before a magistrate, all persons found committing or attempting to commit a felony. (r) But in case of mere suspicion of felony, and in cases of offences less than felony, a private person has at common law no right to apprehend offenders. (s)

The following is from Foster's 'Crown Law,' p. 318, s. 15, 'In the case of private persons using their endeavours to bring felons to justice, these cautions ought to be observed: That a felony hath been actually committed. For if no felony hath been committed, no suspicion, how well soever grounded, will bring the person so interposing within the protection of the law in the sense I have already stated and explained.'

Sec. 16. 'Supposing a felony to have been actually committed, but not by the person arrested (t) or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavouring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he killeth, or on the other hand to make the killing of him amount to murder. I think it would be felonious homicide, but not murder, in either case; the one not having used due diligence to be apprised of the truth of the fact; the other not having submitted and rendered himself to justice, since, if his case would bear it, he might have resorted to his ordinary remedy for the false imprisonment.' (u)

The following is taken from Hale's 'Pleas of the Crown,' Vol. I., p. 490, 'If A. be suspected by B. to commit a felony, but in truth he committed none, neither is indicted, yet upon the offer to arrest him by B. he resists or flies, whereby B. cannot take him without killing him, and B. kills him, if in truth there were no felony committed, or B. had not a probable cause to suspect him, this killing is at least manslaughter, but if there were a felony committed, and B. hath cause to suspect A., but in truth A. is not guilty of the fact, though upon this account B. may justify the imprisonment of A., yet *quære*, if B. kills A. in the pursuit, whether this will excuse him from manslaughter.' (v)

The following is from Hale's 'Pleas of the Crown,' Vol. II. p. 82 'But if a felony be committed, and A. upon probable cause suspects B. to have been the felon, though the law permits him to arrest B., though in truth innocent, yet he cannot justify the killing of him upon his flight and refusing to submit, *justiciari se permittere nolens*;

(r) R. v. Hunt, 1 Moo. C. C. 93. R. v. Howarth, R. & M. C. C. R. 207.

(s) Fost. 318. 2 Inst. 52, 172. Cox v. Wirrall, Cro. Jac. 193. 1 Hale, 490. R. v. Price, 8 C. & P. 282.

(t) See R. v. Price, 8 C. & P. 282.

(u) In a civil action for an arrest, it is a good plea and defence that the defendant

arrested the plaintiff because a felony had been committed, and the defendant had a reasonable ground of suspicion that the plaintiff was guilty of it. Beckwith v. Philby, 6 B. & C. 635.

(v) It seems not. See Foster, p. 318, ante.



but if he kills him, it is at his peril ; for if B. be innocent, it is at least manslaughter, Co. P. C., pp. 56, 221. 22, Assiz. 55, and the reason is because B. is not bound to take notice of A. as authorised to arrest him, as being no officer, nor having any warrant ; it is true, a constable arresting in the king's name, or offering so to do, the party is bound to take notice and submit, as hath been said, part 1, cap. 37, but a mere stranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for possibly he may think he came to rob him. Yet farther, if an innocent person be actually arrested upon suspicion by a private person, all circumstances being duly observed, and he breaks away from the arrest, yet I do not think the person arresting can kill him, though he cannot be otherwise taken, for the person arrested is not bound to take notice of that authority that the law gives to a private person in this case.'

Upon an indictment for wounding, it appeared that the prisoner had asked leave to take a basket of ashes from the prosecutor's ash-pit, which he was permitted to do. As he was carrying away the ashes the prosecutor's apprentice saw the spout of a new tea-kettle which had stood on a shelf near the ash-pit, among the ashes, and having given the alarm, the prosecutor seized the prisoner to detain him while a constable was sent for ; the prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife ; a rattle of copper had been heard while the prisoner was at the ash-pit ; it was objected that the prosecutor had no right to detain the prisoner. Alderson, B., 'That will depend on whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding will be felony.' (w)

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours to prevent an escape ; and in such cases, if fresh suit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit, will be under the same protection of the law ; and the same rule holds, if a felon, after arrest, break away as he is being carried to gaol, and his pursuers cannot retake him without killing him. (x) Thus, where upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorised by law to pursue and apprehend the malefactors ; and that, although there was no warrant of a justice of the peace, to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons ; and that, therefore, the killing of any of the pursuers was murder. (y)

It appears to have been considered, that a private person is not bound to arrest any one standing *indicted* for felony against whom

(w) R. v. Price, 8 C. & P. 282. Alderson, B.

(x) 1 Hale, 489, 490. 1 Hawk. P. C.

c. 28, s. 11. Fost. 309. 1 East, P. C. c. 5, s. 67, p. 298.

(y) Jackson's case. 1 Hale, 464, *ante*, p. 72.

no warrant can be produced at the time; and, therefore, the law does not hold out the same indemnity to such person, as it does to constables and other peace officers, who are *ex officio*, not merely permitted, but enjoined by law, to arrest the parties, as well on probable suspicion of felony, as in case of felony actually committed; and who may therefore well arrest upon the finding of the fact by the grand inquest on oath, which is suspicion grounded on high authority. (z) In this case, however, it might perhaps be well contended, that a person arresting another with the knowledge of the indictment having been found, cannot be properly considered as acting upon his own private suspicion or authority; and ought, therefore, to have the same protection as the officer of justice. And it is said, that the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon; (a) but it is also said, that, if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out; otherwise, they will be guilty of manslaughter. (b)

A private individual is justified in arresting persons committing a breach of the peace in his presence, or in giving them in charge to a constable at the time of the breach, and so long as there is danger of a renewal. (c)

Where private persons interpose in the case of sudden affrays to part the combatants, and prevent mischief, and give express notice of their friendly intent, it will be murder in either of the persons making the affray, who shall kill the party so interposing: but it will not be murder in the other affrayer, unless he also strike the party. (d)

There are many recent statutes which authorise the apprehension of persons found committing certain offences, some of which are here referred to.

By the 24 & 25 Vict. c. 96 (larceny), s. 103, 'Any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of this Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence punishable either

(z) 2 Hale, 84, 85, 87, 91, 93, *sed vide*, 1 Hale, 489, 490. Hawkins, in alluding to the power of arrest by officers in this case, gives as a reason that there is a charge against the party on record. 1 Hawk. P. C. c. 28, s. 12. But upon this it is remarked that it does not readily occur why officers only can take notice of the charge on record. 1 East, P. C. c. 5, s. 68, p. 300.

(a) Dalt. c. 170, s. 5. 1 East, P. C. c. 5, s. 68, p. 301.

(b) 2 Hale, 83, 92; and see 1 East, P. C. c. 5, s. 68, p. 301, where it is said, that if the fact of the guilt of the party be necessary for their complete justification, it is conceived

that the bill of indictment found by the grand jury would, for that purpose, be *prima facie* evidence of the fact. Certainly not. C. S. G. See *R. v. Turner*, R. & M. C. C. R. 347, 2 Hale, 79, 80, 91, 92, 93. 3 Inst. 221. 1 East, P. C. c. 5, s. 69, p. 301.

(c) *Timothy v. Simpson*, 1 C. M. & R. 760. *Ingle v. Bell*, 1 M. & W. 516. *Grant v. Moser*, 5 M. & G. 123. *Baynes v. Brewster*, 2 Q. B. 375. *Price v. Seeley*, 10 Cl. & Fin. 28.

(d) 1 Hawk. P. C. c. 31, ss. 48, 54. *Fost.* 272, 311. 1 East, P. C. c. 5, s. 71, p. 304. *Ante*, p. 67.

upon indictment or upon summary conviction, by virtue of this Act, shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.'

By the 24 & 25 Vict. c. 99 (coinage), s. 31, 'It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence against this Act, and to convey or deliver him to some peace officer, constable or officer of police, in order to his being conveyed, as soon as reasonably may be, before a justice of the peace, or some other proper officer, to be dealt with according to law.'

By the 24 & 25 Vict. c. 97 (injuries to property), s. 61, 'Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, *or the owner of the property injured, or his servant, or any person authorised by him*, and forthwith taken before some neighbouring justice of the peace to be dealt with according to law.'

By the 14 & 15 Vict. c. 19, s. 11, 'It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of peace, to be dealt with according to law.' (e)

So also in the Rural Police Act, 10 & 11 Vict. c. 89, s. 15 (*infra*, p. 93), persons found committing offences against that Act may be apprehended by the owner of the property, on or in respect to which the offence is committed, or his servant, or any person authorised by him.

By the Pawnbroker Act, 1872 (35 & 36 Vict. c. 93), s. 34, A pawnbroker reasonably suspecting that an article offered in pawn has been stolen or illegally obtained, may arrest the person offering the article and deliver him into the custody of a constable. (ee)

So by the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18), s. 6, any constable or other police officer may arrest without warrant any person whom he shall find committing any offence against the Act.

The 9 Geo. 4, c. 69, s. 2, which authorises gamekeepers and others to arrest certain offenders, will be found noticed, Vol. I. p. 945.

Statutes giving authority to apprehend persons '*found committing*' offences should be strictly pursued. Thus where upon an indictment for maliciously cutting a farmer's servant, it appeared that the farmer had directed the servant to apprehend the prisoner for stealing turnips, and the servant very soon after this found the prisoner in a field adjoining his master's turnip field, with a quantity

(e) See this section, vol. i. p. 952.

(ee) See *Howard v. Clarke*, 20 Q. B. D. 558.

of turnips in his possession, and took him into custody, and proceeded with him first to his master's house, and thence to the house of the constable; but on their way there the prisoner said he would go no farther, and drew a knife and wounded the servant: it was contended that the servant had a right to apprehend the prisoner under the 7 & 8 Geo. 4, c. 29, s. 63; but it was held that by that section the owner of the property or his servants were only empowered to apprehend persons *found committing* offences against the Act, and to take them *forthwith* before a justice of the peace. That in this case the prisoner was not found committing the offence, but was in the next field; which brought the case neither within the letter nor the spirit of the enactment. Again, by this enactment, the owner or servant who apprehends must take the offender forthwith before a justice. Now the prisoner was actually taken to the master's, and was about to be taken to the constable's, all which was clearly wrong. (f)

So where on an indictment for the murder of a person, who was assisting a policeman to take a prisoner to the station-house, it appeared that the policeman apprehended the prisoner at night, and that he had concealed on his person new potatoes, fresh dug out of the ground, and with moist earth upon them, and which did not appear to have been dug out of the ground more than half an hour, and the policeman stated that he had been informed that gardens had been robbed, and that he apprehended the man on suspicion of stealing the potatoes out of a garden: but there was no evidence either to shew that any garden had been robbed, or that the prisoner had been in or near any garden; it was objected that the policeman had no authority to apprehend the prisoner; for at common law stealing growing potatoes out of a garden was neither a felony nor misdemeanor, and therefore a policeman had no right at common law to apprehend for it; and under the 7 & 8 Geo. 4, c. 29, s. 63, an offender could only be apprehended if he were 'found committing' the offence, and the preceding case was relied upon; it was held that the objection was valid, and consequently that the case was one of manslaughter only. (g)

But the words 'found committing' must not be taken so strictly as to defeat the reasonable operation of such clauses. The plaintiff, a pedlar, went to the house of Mr. B., and a small dog of Mr. B.'s ran out at the plaintiff, who with a stick gave the dog a blow, which knocked out one of its eyes. The plaintiff then went away, and Mrs. B. immediately sent a boy to fetch a constable, the boy returned with the constable, and Mrs. B. directed them to go after the plaintiff and apprehend him for the injury done to the dog. They went in pursuit of the plaintiff, and found him at a public-house

(f) *R. v. Curran*, 3 C. & P. 397, Vaughan, B.

(g) *R. v. Phelps*, C. & M. 180; and MSS. C. S. G. Neither in this case nor in *R. v. Curran*, was the party seen in the act of committing the offence; but it seems that if the party be seen in the commission of the offence by one person, he may be apprehended by another who did not see him in the com-

mission of the offence. See *R. v. Howarth*, *infra*, p. 80, note (l), and *Hanway v. Boulton*, *infra*, note (h). *Ballinger v. Ferris*, 1 M. & W. 628; *Reed v. Cowmeadow*, 6 Ad. & E. 661, 7 C. & P. 821; and *Beechey v. Sides*, 9 B. & C. 806, cases of actions for illegal apprehension under the 7 & 8 Geo. 4, c. 30, may also be referred to. C. S. G.

about a mile from Mr. B.'s, and the constable apprehended him and took him before a magistrate. Tindal, C. J. (in summing up): 'The jury will have to consider, first, whether the plaintiff had committed a wilful injury to the dog; and secondly, whether he was found committing that offence and immediately apprehended. With respect to the second question, the words of the 7 & 8 Geo. 4, certainly differ materially from those in the 1 Geo. 4, c. 56, and were obviously meant to restrict the powers given by that Act. The object of the Legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature, because otherwise such offences would frequently be committed by persons passing through or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalities of a charge before a magistrate, or a warrant. Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from the 1 Geo. 4, c. 56, and does not allow a stale apprehension on an old charge, without a warrant. Still the words of the present statute must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made: I think that would be sufficient. So, in this case, the party is actually seen in the commission of the act complained of: as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an "immediate apprehension" for an offence which the plaintiff, supposing under the circumstances that it was an offence at all, was "found committing." (h)

Where a policeman found the prisoner in a garden at night, stooping down close to the ground, and the prisoner ran away, and the policeman ran after him and caught him; and it appeared that the prisoner was plucking some carnations in the garden, and the jury found that the prisoner had wilfully and maliciously plucked flowers from plants in the garden with intent to steal them, and that he was found by the policeman committing that offence, but that the policeman did not inform the prisoner by word of mouth that he belonged to the police force; it was held, on a case reserved, that the policeman had authority to apprehend the prisoner. (i)

Upon an indictment for maliciously wounding, it appeared that near midnight two men were seen near a board-house belonging to Oxley; on two persons going up to the board-house, they heard a noise there, and they found the door of the board-house half open, and saw the prisoner inside the board-house and heard a noise among the boards, and the prisoner said 'bring the board;' the two persons then went to Oxley's house to call him up; one of them then went to

(h) *Hanway v. Boulton*, 1 Moo. & Rob. 14, S. C. 4 C. & P. 350. The words of the 1 Geo. 4, c. 56, s. 3 (which was repealed by the 7 & 8 Geo. 4, c. 27), were 'any person or persons who shall have actually committed, or be in the act of committing, any offence.

The words of the 7 & 8 Geo. 4, c. 30, s. 28, on which this case turned, are the same as those in the 7 & 8 Geo. 4, c. 29, s. 68.

(i) *R. v. Fraser*, R. & M. C. C. R. 419. See this case more at full, *post*, p. 105.

the bottom of the road, which was about one hundred yards from the board-house, and in a quarter of an hour Oxley came up, with a carving knife in his hand, and having also got another person to assist him, they went to the board-house, the door of which was then closed; the hasp was over the staple, and the padlock was in the staple, but not locked; nobody was in the board-house; they went in, and Oxley found two planks removed from the place, where he had seen them four days before, to another part of the board-house, nearer the door; they then went on from the board-house, and after searching in several places, found the prisoner in the garden of another person, crouched down under a tree, and with a drawn sword in his hand; the prisoner was asked twice what he did there, he made no answer, and then he started off; one of the witnesses ran and caught hold of him, but the prisoner compelled him to leave hold of him; the prisoner fell over something, and then the other witnesses came up; the prisoner struck Oxley on the side with his sword, but did not cut him; then the prisoner again attempted to get away, but was prevented by some paling; the prisoner then turned round and struck Oxley with his sword, cut through Oxley's hat into his head, and produced a slight wound on his head; up to that time Oxley had not struck the prisoner any blow; the jury negatived the felony in removing the boards from one part of the board-house to another; and it was objected that the prosecutor had no right to apprehend either at common law or under the Vagrant Act (5 Geo. 4, c. 83, s. 6); (*j*) for at common law the power to arrest for offences inferior to felony was confined to the time of committing the offence, and it was the same under the Vagrant Act; that the prisoner was not found by the prosecutor committing the offence, but, on the contrary, had ceased from the attempt and abandoned the intention, which distinguished this case from *R. v. Hunt*; (*k*) but the judges, on a case reserved, held that he might lawfully be apprehended, for as he was seen in the board-house, and was taken on fresh pursuit before he had left the neighbourhood, it was the same as if he had been taken in the outhouse, or in running away from it. (*l*)

Upon an indictment for maliciously wounding, it appeared that the prisoner, with several other persons, was found by Jones, as constable, playing at thimblérig and betting with the people at a fair, between two and four o'clock in the afternoon. Jones having received verbal instructions from the magistrates to apprehend such offenders, tried, with the assistance of another person, to apprehend the prisoner and his companions, and succeeded in taking one, but the prisoner and two others of his company fell upon Jones, rescued their companion, and got away themselves. About nine o'clock in the evening, Jones, not having been able to find the prisoner before, saw him with several of his companions in a public-house, and said to him, 'you are my prisoner.' The prisoner asked 'for what?' and Jones replied, for what he had been doing in the fair; the prisoner resisted, and a scuffle ensued; the prisoner

(*j*) See this Act, *post*, p. 89, note (*l*).

(*k*) 1 Moo. C. C., *ante*, p. 74.

(*l*) *R. v. Howarth*, R. & M. C. C. R. 207. See the remarks of Lord Denman, C. J., in *Baynes v. Brewster*, 2 Q. B. 375.

escaped and concealed himself in a privy in the garden. Jones called another constable to his assistance, and they together broke open the privy door and endeavoured to take the prisoner, upon which he took a knife out of his pocket and stabbed the other constable. The jury found that the prisoner knew that the constable was endeavouring to take him for the offence (against the Vagrant Act) committed at the fair; but upon a case reserved, the judges held that the attempt to apprehend was not lawful under the Vagrant Act, as it was not made on fresh pursuit. (*m*)

**Apprehending night poachers.** — A keeper may apprehend poachers where there are three or more found armed in the night-time committing an offence under 9 Geo. 4, c. 69, s. 9, and if the keeper be killed in the attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender or one of his party, if he struck in self-defence only, and to diminish the violence illegally used against him, and not vindictively to punish. (*n*)

Upon an indictment for attempting to discharge loaded arms with intent to murder, it appeared that the prosecutor found the prisoner and two others by night in a wood in a manor belonging to Lord C.; he pursued them out of that wood into a field not within the manor; and of which Lord C. was neither the owner nor the occupier; and that being hard pressed, the prisoner returned back into Lord C.'s manor; and being still pursued, he levelled his gun and snapped it at the prosecutor; it was objected that the authority to apprehend ceased the moment that the prisoner was out of Lord C.'s manor; but it was held, that as the prisoner returned again upon the manor it was the same as if he had never been off the manor. (*o*)

It was held in the same case that a person, who was not a regularly appointed gamekeeper, but who was employed as a watcher to watch for poachers, had authority (under 9 Geo. 4, c. 69) to apprehend poachers, and that it was not necessary that he should have any written authority. (*p*)

In order to justify the apprehension of a person for night poaching, it must be proved that he was in pursuit of game between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise. (*q*)

A keeper has no right to apprehend poachers under the 9 Geo. 4,

(*m*) *R. v. Gardener*, R. & M. C. C. R. 390. By 5 Geo. 4, c. 83, s. 4, 'every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game, or pretended game of chance,' 'shall be deemed a rogue and vagabond.' By sec. 6, it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act. This Act is amended by the 36 & 37 Vict., c. 38.

(*n*) *R. v. Ball*, R. & M. 330. See the section, vol. i. p. 946. As to arresting an offender committing an indictable offence in the night-time, see vol. i. p. 952. See *R. v. Payne*, R. & M. 378, *post*, p. 105.

(*o*) *R. v. Price*, 7 C. & P. 178. J. A. Park and Coleridge, JJ. It seems that the terms of sec. 2 of 9 Geo. 4, c. 69, were not adverted to in this case; they seem clearly to give authority to apprehend 'in any other place' to which the offender escapes, without reference to its being within the manor or the property of the person, on whose land the poachers were found. C. S. G. And see 14 & 15 Vict. c. 19, s. 11, vol. i. p. 952.

(*p*) *R. v. Price*, *supra*.

(*q*) *R. v. Tomlinson*, 7 C. & P. 183, Coleridge, J.

c. 69, s. 2, unless they are found committing an offence upon land which belongs to his master, or is within his master's manor. (r) If a keeper endeavour to apprehend a poacher when he is not authorised to do so, and the poacher kill him in order to prevent his apprehension, it is only manslaughter. (s)

Where three or more poachers are out by night committing an offence within the 9 Geo. 4, c. 69, s. 9, any person may now apprehend the offenders by the 14 & 15 Vict. c. 19, s. 11. (t)

The prosecutor, being out on duty at night as gamekeeper with his assistant on his master's manor, heard shots towards a wood not belonging to his master, and shortly afterwards saw the prisoners coming along a road in the direction from the wood; the prisoners were armed with a gun, gun-barrel, and bludgeons; they stopped when they saw the prosecutor and his assistant; the prosecutor and his assistant advanced towards the prisoners, when the prosecutor said, 'So, you have been knocking them down; you are a pretty set of people to be out so late at night;' they were then about three yards off; the prosecutor said to his assistant, sufficiently loud for the prisoners to hear, 'Mind him with the gun;' the assistant took hold of the gun gently, one hand on the stock the other on the barrel, and took off the cap gently; there was no struggle; the man did not seem angry at the assistant's holding the gun; the prosecutor saw one of the prisoners, and advanced to look at the faces of the other two, but they bounced off. The prosecutor then turned back towards his assistant and the man who had the gun, and called out as loud as he could, 'Forward, Giggles.' Giggles was the keeper of the manor in which the wood was situate, but he was not there. Three of the men ran in upon the prosecutor, knocked him down and stunned him; when he recovered himself he saw all the men coming by him, and one said, 'Damn 'em, we have done 'em both;' they had got two or three paces beyond him, and one of them turned back and struck the prosecutor a violent blow on the left leg with what he thought was a stick, which wounded him in the leg; the prosecutor had committed no assault on either of the four men. The assistant took hold of the gun to prevent the man's running away, but did not tell him so; he took hold of it to let the keeper see if he knew the men; the manor, in which the wood was, extended more than 200 yards beyond where the prisoners were seen; it was objected that the prisoners were on the high road, and the prosecutor and his assistant had no right to obstruct them; but the jury having found the prisoners guilty, the judges, upon a case reserved, held the conviction right. (u)

**Arrest by a railway officer.** — Where on an indictment for assaulting J. Smith it appeared that the prisoner got into an empty third-

(r) Admitted in *R. v. Warner*, R. & M. 380.

(s) *R. v. Addis*, 6 C. & P. 388, *Patterson, J. R. v. Davis*, 7 C. & P. 785. *Parke, B.*

(t) See this section, vol. i. p. 952.

(u) *R. v. Warner*, R. & M. C. C. R. 380. S. C. 5 C. & P. 525. It was also objected that the blow on the leg was the act of one alone, and there was no evidence which of

the prisoners inflicted it; and as one of the prisoners, before the blow was given, said, 'we've done 'em,' it must be taken that it was supposed both men were dead, and therefore there could be no intent to murder, &c. *Bolland, B.*, told the jury that if they thought the prisoners were acting in concert they were all equally guilty.



class carriage proceeding from Manchester to Stoke-upon-Trent, and got out on the wrong side at North Road Station, and being asked by the guard for his ticket, he said he had none, and had intended to get out at the station for Crewe Junction. No other demand was made on the prisoner; but the guard ordered him to get into a second-class carriage, and locked the doors. The train then proceeded to Stoke, a distance of several miles. The prisoner on getting out, was asked for his ticket; and on his not producing it, the second-class fare from Manchester to Stoke was demanded. It not being paid, the policeman at the station collared the prisoner, who gave him a blow and got away. He was pursued and retaken, when he cut the policeman's hand. The reason alleged for bringing the prisoner to Stoke was, that it was the headquarters of the railway authorities, and there was no mode of dealing with the prisoner at the North Road Station. Wightman, J., told the jury (after stating the facts that occurred at the North Road Station), 'the guard, instead of then taking him on the specific charge of going so far without his ticket, which perhaps he might have done, takes him in a second-class carriage to Stoke, several miles out of the way. A ticket from Manchester to Stoke is there demanded and afterwards the full fare. It seems to me that this is clearly beyond the law, and that the railway authorities had no right to demand the fare from North Road to Stoke. I do not give any opinion as to the right to convey a person refusing to produce his ticket at one station on to another, on the charge of not paying his fare for that part of the journey which the prisoner had voluntarily and fraudulently performed; but whatever might have been the situation of the parties, if, on demand and refusal of the ticket or fare at North Road, the charge was there made, and he had been conveyed to Stoke for the purpose of dealing with it; here, the arrest being for non-payment of the fare to Stoke, the apprehension was illegal, and the prisoner had a right to resist it.' (v)

**When a constable may arrest.** — A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another. (w)

A constable is not in general justified in arresting a person for a misdemeanor without a warrant, but he is justified in arresting without a warrant persons committing a breach of the peace in his presence, (x) and whilst there is danger of a renewal, (y) but not after the breach and danger of renewal have ceased, (z) and he may arrest persons given in charge by one who has witnessed the breach of the peace, where there is danger of immediate renewal. (a)

(v) *R. v. Mann*, 6 Cox, C. C. 461. See *Chilton v. London and Croydon Railway Co.*, 16 M. & W. 212.

(w) *Beckwith v. Philby*, 6 B. & C. 635; *Hobbs v. Branscomb*, 3 Camp. 420; *Davies v. Russell*, 5 Bing. 354; *Hogg v. Ward*, 27 L. J. Ex. 443; 3 H. & N. 417; 2 Hale, 79, 80, 91, 92, 93.

(x) *Timothy v. Simpson*, 1 C. M. & R. 760; *Derecourt v. Corbishley*, 5 E. & B. 188.

(y) *R. v. Light*, 27 L. J. M. C. 1.

(z) *R. v. Walker*, 23 L. J. M. C. 123; *Cork v. Nethercote*, 6 C. & P. 741; *R. v. Bright*, 4 C. & P. 387.

(a) *Timothy v. Simpson*, *supra*.

In order to justify an arrest for a misdemeanor, it is necessary for the officer to have the warrant with him. (*aa*)

C. was summoned for trespassing in pursuit of conies. He absconded, and a warrant was issued for his apprehension, addressed to all peace officers in the county of Devon. A constable in the county police force endeavoured to arrest C. at a time when he had not the warrant in his possession. C. resisted and assaulted the constable: — Held, ‘that as the offence with which C. was charged was not felony, C. was justified in resisting the attempt of the constable to arrest him without having the warrant in his possession.’ (*b*)

A constable is not justified in imprisoning a person in the belief that he has committed a misdemeanor. (*bb*)

On an indictment for shooting at the prosecutor with intent to do grievous bodily harm, it appeared that the prisoner was a constable and employed to guard a copse, from which wood had been stolen, and for this purpose carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner having no other means of bringing him to justice fired, and wounded him in the leg. It was further alleged that the prosecutor was actually committing a felony, he having been before convicted repeatedly of stealing wood; (*c*) but these convictions were unknown to the prisoner, nor was there any reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. Erle, J., told the jury that shooting with intent to wound amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner, that it was his duty to fire, if he could not otherwise apprehend the prosecutor, nor the alleged felony, it being unknown to him, constituted such justification; and upon a case reserved, it was held that the conviction was right; for the prisoner was not justified in firing, because the fact that the prosecutor was committing a felony was unknown to him at the time. (*cc*)

A prisoner had produced a forged bank note; and from his conduct at the time, which justified a suspicion that he knew it to be forged, he was apprehended and taken to a constable, and delivered with the note to the constable; and the charge to the constable was, ‘because he had a forged note in his possession.’ After he had been in custody at the constable’s some hours, the constable was handcuffing him to another man, when he pulled out a pistol and shot

(*aa*) *R. v. Chapman*, 12 Cox, C. C. 4. Hannen, J.; *post*, p. 97.

(*b*) *Codd v. Cabe*, 1 Ex. D. 352; 45 L. J. M. C. 101; 13 Cox, C. C. 202.

(*bb*) *Griffin v. Colman*, 28 L. J. Ex. 134; 4 H. & N. 265.

(*c*) These previous convictions made the

prosecutor’s act a felony; see 7 & 8 Geo. 4, c. 29, s. 39. See the present enactment 24 & 25 Vict. c. 96, s. 33, vol. ii., Larceny.

(*cc*) *R. v. Dadson*, 2 Den. C. C. 35; 20 L. J. M. C. 57. This case was not argued. See *contra R. v. Bentley*, *post*, p. 85.<sup>1</sup>

#### AMERICAN NOTE.

<sup>1</sup> See Bishop, i. s. 441, citing Lord Stowell. *The Abbey*, 5 Rob. 251, 254.

the constable. The constable was not killed, but the prisoner was indicted upon the 43 Geo. 3, c. 58; and it was urged on his behalf that the charge imported no legal offence, for unless he knew the note to be forged he was no felon; and if the charge was insufficient, the arrest was illegal; and killing the officer (if that had taken place) would have been only manslaughter. But the judges were all of opinion that this defect in the charge was immaterial; that it was not necessary for such a charge to contain the same accurate description of the offence as would be required in an indictment; and that the charge in question must have been considered as imputing to the prisoner a guilty possession. (*d*)

On an indictment for wounding with intent to prevent the lawful apprehension of the prisoner, Talfourd, J., held, that to support this charge it was enough that the prisoner was lawfully apprehended, and that the apprehension was in fact lawful, the question whether or not the prisoner believed it to be lawful, could not be permitted to be considered. (*e*)

On an indictment for stabbing with intent to murder, upon the 43 Geo. 3, c. 58, it appeared that the prisoner, a journeyman shoemaker, applied to his master for some money, which was refused until he should have finished his work; he applied again subsequently, was again refused, and became abusive, upon which his master threatened to send for a constable. The prisoner then refused to finish his work; and said that he would go up stairs and pack up his tools, and that no constable should stop him. He went up stairs, came down again with his tools, and drawing from the sleeve of his coat a naked knife, said he would do for the first constable that offered to stop him; he was ready to die, and would have a life before he lost his own. He then made a flourishing motion with the knife, put it up his sleeve again, and left the shop. The master then applied to a constable to take the prisoner into custody; making no charge further than saying that he suspected the prisoner had tools of his, and was leaving his work undone. The constable said he would take him if the master would give charge of him; and they proceeded together to the yard of an inn, where they found the prisoner in a public privy, as if he had occasion there; the privy had no door to it. The master said, 'That is the man, and I give you charge of him;' upon which the constable said to the prisoner, 'My good fellow, your master gives me charge of you, you must go with me.' The prisoner, without saying anything, presented the knife, and stabbed the constable under the left breast, and attempted to make several other blows, which the constable parried off with his staff. The prisoner having been found guilty, upon a case reserved, the majority of the judges (*f*) held, that as an actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the

(*d*) *R. v. Ford*. MS. Bayley, J., and R. & R. 329.

(*e*) *R. v. Bentley*, 4 Cox, C. C. 406.

(*f*) *Abbott*, C. J., *Graham*, B., *Bayley*, J., *Park*, J., *Garrow*, B., *Hullock*, B., *Littledale*, J., and *Gaselee*, J.

case manslaughter only; and that therefore the conviction was wrong. (*g*)

Upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that the prisoners had attempted to push a man into a ditch, upon which a scuffle ensued. The prisoners walked on, and the man complained to Harrison, a watchman, that they had attempted to rob him, desired him to arrest them, followed them till Harrison came up to them, and then said, sufficiently loud for them to hear, 'That's them.' There was no evidence of any attempt by the prisoners to rob the man, and the only person who saw the transaction negatived it. When Harrison came up to the prisoners, all he said to them was, 'You must go back and come along with me.' He did not explain why, nor was any charge against the prisoners stated. He was dressed in a watchman's coat, and had his lantern. W., one of the prisoners, said, 'keep off,' and drew a sharp instrument from his side; the watchman said, 'it's of no use, you must go back.' A third man put himself in a position as if to strike the watchman, and W. made a spring at him, and caught one of the skirts of his coat; the watchman pulled out his staff, and turned at the prisoners, and they came at him. The watchman struck at W., and hit him on the thick part of the arm with his staff; W. immediately stabbed the watchman, and another of the prisoners followed the watchman, and made another blow at him with another knife. The place where the prisoners attempted to push the man into the ditch was within the limits of the hamlet, for which Harrison was watchman, but the place where he overtook the prisoners did not appear to be within those limits. The jury found that the prisoners knew Harrison to be a watchman. Bayley, B., reserved the case for the opinion of the judges, nine of whom held that the watchman could legally arrest the prisoners without saying that he had a charge of robbery against them, though the prisoners had in fact done nothing to warrant the arrest; and that, had death ensued, it would have been murder. Four of the judges (*h*) were of a contrary opinion. (*i*)

A constable, or other known conservator of the peace, may lawfully interpose upon his own view to prevent a breach of the peace, and to quiet an affray; and if he or any of his assistants, whether commanded or not, be killed, it will be murder in all who take part in the resistance; there being either implied or express notification of the character in which he interposed. (*j*) A constable or other peace officer is not authorised to arrest a person upon a charge by another of a mere breach of the peace, after the affray

(*g*) Holroyd and Burrough, JJ., thought otherwise. *R. v. Thompson*, 1 R. & M. C. C. 80. See *Rafferty v. P.* 12 Cox, C. C. 617.<sup>1</sup>

(*h*) Bayley, B., Park, Littledale, and Bosanquet, JJ.

(*i*) *R. v. Woolmer*, R. & M. C. C. R. 334. Lord Lyndhurst, and Taunton, J., were absent.

(*j*) 1 Hale, 463. 1 Hawk. P. C. c. 31, s. 54. *Fost.* 310, 311. 1 East, P. C. c. 5, s. 71, p. 303.

#### AMERICAN NOTE.

<sup>1</sup> It was held in this case (69 Ill. p. 111), that where an unlawful arrest is attempted the party pursued may kill his assailant

deliberately, but this doctrine is not generally approved. See *post*, p. 104.

is ended, and peace restored, and there is no danger of immediate renewal, without a warrant from a magistrate. (*k*)

Upon an indictment for maliciously cutting Walby, it appeared that a man travelling upon the highway told the constable that a man coming along the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take the prisoner before a magistrate for so misusing him; on which the constable, meeting the prisoner passing along the highway, ordered him to stop for insulting a man on the road, laid hold of him, tapped him on the shoulder, said he was his prisoner, and that he should take him to a magistrate, and ordered Walby to assist him, which W. did, and to which the prisoner submitted. No particulars of what the supposed ill-usage or insult consisted of appeared in evidence, nor did they pass in the constable's view or hearing, and therefore the apprehension and detainer appeared clearly thus far to have been unlawful. Afterwards, and whilst the prisoner was thus in custody, and before they found a magistrate, the prisoner struck the man, in the constable's presence, who had made the charge against him, and the constable then also told the prisoner he should take him before a magistrate; and some time afterwards, as they were proceeding along to a magistrate's the prisoner ran away, and attempted to escape, but was pursued by W. by the constable's order; and being overtaken by him, refused to stop, asking W. where his authority was, who said it was in his hand, alluding to a stick, which W. then had in his hand, and which the prisoner had given up to him at the commencement of the detainer; and without further information, when W. was going to take hold of him, the prisoner told him if he would not let him go he would stab him, and then gave him the cut in the face, for which he was thus indicted. Holroyd, J., doubted whether the effect of the first illegal custody might not operate upon the circumstances that subsequently took place, as a defence against the present indictment, either in rendering even the subsequent imprisonment tortious, or depriving the prisoner's conduct of the necessary legal ingredient of malice; and he reserved the case for the opinion of the judges, who held that the original arrest was illegal, and that the recaption would have been illegal, and therefore the case would not have been murder if death had ensued. (*m*)

Where on an indictment for wounding with intent to disable, it appeared that the prosecutor was a sergeant of police and the prisoner a constable under him, and that the prosecutor went, as it was his duty, to the house of the prisoner to see that he was correct in the discharge of his duty, and the prisoner had some altercation with him, and the prosecutor left the house, the prisoner followed and struck him; and fell when attempting to strike him a second time, and the prosecutor then went away for assistance, and returned to the prisoner's house with two police constables, when the prisoner was not at home: they returned again

(*k*) 1 East, P. C. c. 5, s. 72, p. 305, 2 Inst. 52. 2 Hawk. P. C. c. 12, s. 20, and c. 13, s. 8. 2 Lord Raym. 1301. Strickland v. Pell, Dalt. c. 1, s. 7. 2 Hale, 90. Handcock v. Sandham and others, 1785, and Williams v. Dempsey, 1787, cited in 1 East, P. C. id. 306.

(*m*) R. v. Curvan, R. & M. 132.

in two hours and saw him, and the prosecutor told him that he must go with him to the station; the prisoner said he would not stir an inch that night; the prosecutor attempted to take hold of him, whereupon the prisoner inflicted a severe wound upon him; and the jury found him guilty of wounding with intent to prevent his apprehension. It was held, upon a case reserved, that the apprehension was not lawful; for the assault was committed at another time, and there was no probability of its being renewed.<sup>(n)</sup>

Upon an indictment for assaulting the prosecutor, an officer in the police, in the execution of his duty, it appeared that the prosecutor was informed that a disturbance was going on in Patfield, and went thither, and found the prisoner's wife sitting crying under a hedge opposite their cottage, and he went with her into the cottage, and found the prisoner intoxicated, but sufficiently sober to know what he was doing. In his hearing, the wife stated to the prosecutor that the prisoner had knocked her down and beaten her shamefully. One Cook was present, and stated that he had seen the prisoner knock his wife down and jump upon her, and Cook had, in fact, seen this done a short time previously. The prisoner said nothing on hearing these statements. Prosecutor left the cottage, and the prisoner and his wife in it. The prisoner then closed the shutters, and locked the door. The prosecutor heard the prisoner using threatening language to his wife, and saw her run out of the cottage. The prisoner said he would lock her out all night, and thereupon she returned into the cottage. The prosecutor heard the prisoner again use very violent language, and opened the shutters, and saw the prisoner take up a shovel and hold it in a threatening attitude over his wife's head, and heard him say, 'If it was not for the bloody policeman outside I would split your head open, for 't is you that sent for the policeman.' The prisoner was near enough to have struck his wife when he raised the shovel. Shortly afterwards he desired her to go to bed, and she replied, 'I can't go up stairs in this state; I don't know one hour from another when I might be murdered.' Prisoner said with an oath, 'I'll leave you altogether,' and went out. This was about twenty minutes after he had raised the shovel. He went on the highway towards his father's house, and when he had walked about seventy yards from his cottage the prosecutor took him into custody. He had no warrant. Cook had been the prosecutor all the time these things occurred, and insisted on his taking the prisoner into custody, because he thought it would not be safe to let him go back to his wife that night. The prisoner, on being taken into custody, assaulted the prosecutor. And, upon a case reserved, it was held that the prosecutor was in the execution of his duty when he was assaulted. It is not necessary that a policeman should arrest a man at the very moment he sees an assault committed; it is quite sufficient if he arrests recently after the right to do so arises. It cannot be said, that because the prisoner was going away from the house, the constable was bound to come to the conclusion that the danger was over. As a conservator

(n) *R. v. Walker*, Dears, C. C. 358; *R. v. Marsden*, 37 L. J. M. C. 80; L. R. 1 C. C. R. 131.

of the peace, he had authority to take the prisoner into custody, he having so recently witnessed the commission of an assault. Here there was a continuing danger and a continuing pursuit, and it was the duty of the policeman to exercise his authority in this case, in order to prevent a further breach of the peace, and also that the prisoner might be dealt with according to law in respect of the assault he had so recently committed. (*o*)

There is no distinction as to the power to apprehend between one kind of misdemeanor and another, as between a breach of the peace and fraud, but the rule is general, that in all cases of misdemeanor there is no power to apprehend after the misdemeanor has been committed. (*p*)

If one menace another to kill him, and complaint be made thereof to the constable forthwith, such constable may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him to a justice of the peace. (*q*)

It has been said, that if peace officers meet with night-walkers,<sup>1</sup> or persons unduly armed, who will not yield themselves, but resist or fly before they are apprehended, and who are upon necessity slain, because they cannot otherwise be overtaken, it is no felony in the officers or their assistants, though the parties killed were innocent. (*r*) But it is doubted whether, at this day, so great a degree of severity would be either justifiable or necessary (especially in the case of bare flight), unless there were a reasonable suspicion of felony. (*s*) And it has been considered, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer. (*t*) Where a private Act authorises watchmen to apprehend

(*o*) *R. v. Light*, D. & B. C. C. 332.

(*p*) *Fox v. Gaunt*, 3 B. & Ad. 798. *Bowditch v. Balchin*, 5 Ex. R. 378.

(*q*) 2 Hale, 88. *Dalton* (ch. 116, s. 3). *Vide* 1 East, P. C. c. 5, s. 72, p. 306.

(*r*) 2 Hale, 89, 97. The statutes 2 Edw. 3, c. 3, and 5 Edw. 3, c. 14, relate to the apprehension of night-walkers, and persons unduly armed. But the latter Act is repealed by the 19 & 20 Vict. c. 64. And see *Lawrence v. Hedger*, 3 Taunt. 14.

(*s*) 1 East, P. C. c. 5, s. 70, p. 303. Both the statutes mentioned in the last note were levelled against particular descriptions of offenders who roved about the country in bodies, in a daring manner. See *R. v. Daddon*, 2 Den. C. C. 35, *post*.

(*t*) *Tooley's case*, 2 Lord Raym. 1296. There is a MS. note of this case given by the editor of Lord Hale (2 Hale, 89), which states Lord Holt to have said, that of late constables had made a practice of taking up people only for walking the streets: but that he knew not whence they had such authority. See *Lawrence v. Hedger*, 3 Taunt. 14. 2

*Hawk. P. C. c. 13, s. 6, c. 12, s. 20.* It has been held that a person may be indicted for being a common night-walker, as for a misdemeanor. 2 *Hawk. P. C. c. 12, s. 20. Latch. 173. Poph. 208.* By the Vagrant Act, 5 Geo. 4, c. 83, s. 6, it is made lawful for any person whatsoever to apprehend any person who shall be found offending against that Act, and forthwith to take and convey him or her before some justice of the peace, to be dealt with in such manner as is thereinbefore directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, to be so taken and conveyed as aforesaid: and it further enacts, that in case any constable or other peace officer shall refuse, or wilfully neglect, to take such offender into custody, and to take and convey him or her before some justice of the peace, or shall not use his best endeavours to apprehend and to convey before some justice of the peace, any person that he shall find offending against the Act, it shall be deemed a neglect of duty in such constable

#### AMERICAN NOTE.

<sup>1</sup> In the American States there are statutes against night-walking. Bishop, i. s. 501(4).

night-walkers, malefactors, and suspicious persons, and a watchman apprehended a gentleman returning from a party for uttering some words in a street at night, it was held that the apprehension was illegal, for by night-walkers is meant such persons as are in the habit of being out at night for some wicked purpose. (*u*) So the words 'suspected person or reputed thief,' in the 3 Geo. 4, c. 55, s. 21 (the former London Police Act), were directed against persons of *general* suspicious character, and frequenting places where they might be reasonably suspected of resorting for felonious purposes. (*v*)

The plaintiff was using abusive language in an inn to one of the persons there, on which the owner of the inn sent for a policeman, who, by his direction, took the plaintiff to the station-house. Patteson, J.: 'The landlord of an inn or public-house, or the occupier of a private house, whenever a person conducts himself as the plaintiff did, is justified in telling him to leave the house, and, if he will not do so, he is justified in putting him out by force, and may call in his servants to assist in so doing. He might also authorise a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law; but although it would be no part of the policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance than the owner himself could do.' (*w*)

Upon an indictment for assaulting a policeman in the execution of his duty, it appeared that the policeman was called into a public-house to put an end to a disturbance which the defendant was making; he and the landlady were at high words; W. L. interfered, and the defendant was in the act of squaring at him when the policeman desired the defendant not to make a disturbance; the defendant, who was at the side of the bar, then attempted to go into the parlour, in which a person was sitting; as the defendant attempted to get into the parlour, the policeman collared him, and prevented his going in; he then struck the policeman; neither the landlord nor landlady had desired the policeman to turn the defendant out of the house. Parke, B.: 'The policeman had a right to be in the house without being called upon either by the landlord or landlady to interfere, but under the circumstances he had no authority to lay hold of the defendant, unless you are satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlour; and if you think it was not, it was no part of the policeman's duty to prevent the defendant from going into the parlour.' (*y*)

To trespass for false imprisonment the defendant pleaded that he was possessed of a public-house, and that the plaintiff was in the

or other peace officer, and he shall, on conviction, be punished in such a manner as is thereafter directed.

(*u*) *Watson v. Carr*, 1 Lewin, 6, Bayley, J.

(*v*) *Cowles v. Dunbar*, Moo. & M. 37, Lord Tenterden, C. J. As to the meaning of 'frequenting' see *Clark v. R.*, 14 Q. B. D. 92.

(*w*) The 18 & 19 Vict. c. 118, s. 4, makes

it lawful for 'any constable at any time to enter into any house or place of public resort in England and Wales for the sale of beer, wine, spirits, or other fermented and distilled liquor, and imposes a penalty on persons refusing to admit such constable. *Wheeler v. Whiting*, 9 C. & P. 262, Patteson, J.

(*y*) *R. v. Mabel*, 9 C. & P. 474, Parke, B.



house, and conducted himself in a riotous, quarrelsome, disorderly, and uncivil manner, and committed a breach of the peace therein; that the plaintiff was requested to depart, and refused, whereupon the defendant gently laid his hands on the plaintiff to remove him, and because the plaintiff violently and forcibly resisted the said removal, the defendant gave him in charge to a watchman, who saw the said breach of peace: it appeared that a watchman, who was on duty, in consequence of hearing a noise, went into the defendant's public-house, where he found the plaintiff and five or six other young men making a disturbance; he led the plaintiff out of the house, and about fifteen yards along the street, and then let him go; he said he would go back and have his revenge, and went towards the public-house; the watchman went round his beat, and on his return he heard a person at the door of defendant's house cry 'Watch,' and he in consequence went in and found the plaintiff sitting down, he then sprung his rattle, and the defendant tried to put the plaintiff out of the house, the plaintiff having hold of the defendant's collar to resist being put out, on which the watchman took the plaintiff into custody, and took him to the watchhouse. Parke, B.: 'There is no doubt that a landlord may turn out a person who is making a disturbance in a public-house, though such disturbance does not amount to a breach of the peace. To do this the landlord may lay hands on him, and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord; and, if the watchman in this case saw such assault committed, that would make out the plea. There might, it is true, be a sufficient breach of the peace to justify the defendant, as the landlord of the house, in giving the plaintiff into custody without this assault; and even if there was no assault at all. For if the plaintiff made such a noise and disturbance as would create alarm and would disquiet the neighbourhood, and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorise the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody, if this occurred in the view of the watchman: the watchman has said he saw the piece of work the first time he went into the house. Now, if the plaintiff and others were then conducting themselves in a manner calculated to disturb the neighbourhood, this would justify the watchman in turning the plaintiff out, and in taking him into custody, if on his going to the house the second time he found the plaintiff still there.' (z)

Where in an action for assaulting the plaintiff and giving him into custody, the defendant justified having done so, and his witnesses stated that the plaintiff, who was the butler of the defendant, was making a great noise in the defendant's house, and had quarrelled with the coachman, and that when the defendant came down stairs the plaintiff was abusive to him and violent in his manner, and making a great noise, and laid hold of him, and they struggled together; Lord Campbell, C. J., directed the jury, that if a person came into a house, or was in it, and made a noise and disturbed

(z) *Howell v. Jackson*, 6 C. & P. 723, Parke, B. *R. v. Prebble*, 1 F. & F. 325.

the peace of the family, although no assault had been committed, the master of the house might turn him out or call a policeman to do so; and if the plaintiff had assaulted his master and misconducted himself in the manner described by the defendant's witnesses, the defendant would be justified in giving the plaintiff in charge to the policeman, to be dealt with according to law. (a)

It has sometimes happened that police officers have taken opposite parties in an affray, and the death of one of them has ensued; as in the case put by Lord Hale, where A. and B., being constables of the vill of C., and a riot or quarrel happening between several persons, A. joined with one party, and commanded the adverse party to keep the peace, and B. joined with the other party, and in like manner commanded the adverse party to keep the peace, and the assistants and party of A. in the tumult killed B. (b) This, Lord Hale says, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other: (c) but upon this it has been remarked, that perhaps it had been better expressed to have said, that inasmuch as they acted not so much with a view to keep the peace, as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and without any authority whatever. (d) And in another case, Lord Hale says, that if the sheriff have a writ of possession against the house and lands of A., and A., pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the King's writ. (e)

Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and, as it was thought for some time, had killed her: whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which he proceeded to take them into custody upon the charge of murder; and at first, offered to take care also of their prisoner, but the latter was soon rescued from them by the surrounding mob. The woman having recovered, the bailiffs were released by the constable the next morning. Upon an indictment for an assault and rescue, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly. (f)

(a) *Shaw v. Chairitie*, 3 C. & K. 21.

(b) 1 Hale, 460.

(c) *Id.* *ibid.*

(d) 1 East, P. C. c. 5, s. 71, p. 304.

(e) 1 Hale, 460.

(f) *Anon. Exeter Sum. Ass.* 1793. 1 East, P. C. c. 5, s. 71, p. 305.

There are many recent statutes giving constables special powers of arrest. The following statutes may be here noticed:—

By the 24 & 25 Vict. c. 96 (larceny), s. 104, 'Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying and loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.'

Similar provisions are contained in the 24 & 25 Vict. c. 97 (malicious injuries to property), s. 57, and the 24 & 25 Vict. c. 100 (offences against the person), s. 66.

So by the Rural Police Act, 10 & 11 Vict. c. 89, s. 15, 'any person found committing any offence punishable either upon indictment, or as a misdemeanor upon summary conviction, by virtue of this or the special Act, may be taken into custody, without a warrant, by any of the said constables, or may be apprehended by the owner of the property on or with respect to which the offence is committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable; and the person so arrested shall be taken, as soon as conveniently may be, before some justice to be examined and dealt with according to law: provided always, that no person arrested under the powers of this or the special Act shall be detained in custody by any constable or other officer, without the order of some justice, longer than shall be necessary for bringing him before a justice, or than forty hours at the utmost.'

By the 27 & 28 Vict. c. 47, which contains provisions as to licences to be granted to convicts, it is provided (sec. 6), that any constable or police officer may without warrant take into custody any holder of such licence 'whom he may reasonably suspect of having committed any offence, or having broken any of the conditions of his licence, and may detain him in custody until he can be taken before a justice of the peace or other competent magistrate, and dealt with according to law.' (ff)

It has been shewn that though, even in *civil* cases, an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reasonable necessity; (g) yet if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means. (h)

The authority of an officer, in civil cases, must be regulated and limited by the writ or process which he is empowered to execute, and by the extent of the district in which he is privileged to act. It is only in the character of officer that he can proceed to arrest

(ff) See vol. i. p. 78, *et seq.*

(g) *Ante*, p. 78.

(h) 1 Hale, 481. Fost. 271.

or imprison, as no private person can of his own authority arrest in civil suits. (*i*)

If a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats; had ammunition given to him when he was put upon guard; and acted under the mistaken impression that it was his duty. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were, to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly to them to keep off; but one of them persisted and came close under the ship; and he then fired at a man who was in the boat, and killed him. It was put to the jury to find, whether the sentinel did not fire under the mistaken impression that it was his duty; and they found that he did. But a case being reserved, the judges were unanimous that it was, nevertheless, murder. They thought it, however, a proper case for a pardon; and further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. (*o*)

**Warrants.** — The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the Court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law; and therefore, if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter. (*p*) And it has been ruled, that homicide committed upon a bailiff, attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause, will not amount to murder. (*q*) Where a warrant was directed 'to C. S., one of the collectors of the parish of W., the constables of the said parish, and all others His Majesty's officers,' to levy a distress, it was held that the constable of W. had no authority to execute it out of the parish of W.; the rule of law being, that where a warrant is directed to officers, as individuals, or to individuals who are not officers, they may execute it anywhere within the extent of the magistrate's jurisdiction; but where it is directed to men by the name of their office, it is confined to the districts in which they are officers. (*r*) But the law as to the latter point was altered by the 5 Geo. 4, c. 18, which was repealed by the 11 & 12 Vict. c. 43, s. 36, but re-enacted by sec. 3 of that Act and the 11 & 12 Vict. c. 42, s. 10, by which warrants to apprehend may be directed either to any constable or

(*i*) 1 Hawk. P. C. c. 23, s. 19.

(*o*) *R. v. Thomas*, East. T. 1816. MS. Bayley, J. The prisoner was tried at Nisi Prius, 4 M. & S. 441.

(*p*) 1 Hale, 457, 458, 459. 1 East, P. C. c. 5, s. 80, pp. 312, 314.

(*q*) *R. v. Mead and another*, 2 Stark. C. 205. 1 Hale, 459. 2 Hawk. P. C. c. 13, ss. 27, 30.

(*r*) *R. v. Weir*, 1 B. & C. 288. 2 D. & R. 444. See per Lord Holt in *R. v. Chandler*, 1 Lord Rayn. 545.

other person by name, or generally to the constable of the parish or other district within which the same is to be executed without naming him, or to such constable and all other constables or peace officers in the county or other district within which the justice or justices issuing such warrant has or have jurisdiction, or generally to all the constables or peace officers within such last-mentioned county or district, and such warrant may be executed by apprehending the offender or defendant at any place within the county, riding, division, liberty, city, borough, or place within which the justice or justices issuing the same shall have jurisdiction, or in case of fresh pursuit at any place in the next adjoining county or place and within seven miles of the border of such first-mentioned county, riding, division, liberty, city, borough or place, without having such warrant backed; and in all cases where such warrant shall be directed to all constables or other peace officers within the county or other district within which the justice or justices issuing the same shall have jurisdiction, it shall be lawful for any constable, head-borough, tithing-man, borseholder, or other peace officer for any parish, township, hamlet, or place within such county or district, to execute the said warrant within any parish, township, hamlet, or place situate within the jurisdiction for which such justice or justices shall have acted when he or they granted such warrant, in like manner as if such warrant were directed specially to such constable by name, and notwithstanding the place in which such warrant shall be executed, shall not be within the parish, township, hamlet, or place, for which he shall be such constable, tithing-man, borseholder, or other peace officer. (s)

Where, since these Acts, a search warrant was directed 'to the constable of Dauntsey,' and headed 'Wilts (to wit);' but, instead of being delivered to that constable, it was delivered to a county police-constable appointed under the 2 & 3 Vict. c. 98, s. 3, who was attached to the district in which Dauntsey was situated, and executed by him in Dauntsey; it was held that the execution of the warrant was illegal, as it could only be executed by a constable of Dauntsey. (t)

The 11 & 12 Vict. c. 42, s. 11, provides for the endorsement of warrants in cases of indictable offences, and enacts that the 'endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed; and also to all constables and other peace officers of the county or place where such warrant shall be so endorsed to execute the same in such other county or place.' And the 11 & 12 Vict. c. 43, s. 3, extends this provision to all warrants and commitments issued under that Act.

The 5 Geo. 4, c. 18, did not extend to the warrant of a judge of the King's Bench, but only to the warrants of persons having authority as justices of the peace within the limited jurisdictions

(s) This statement is framed from the 11 & 12 Vict. c. 42, s. 10, and 11 & 12 Vict. c. 43, s. 3, which vary in terms, but agree in substance. See 31 & 32 Vict. c. 107, entitled 'An Act to amend the law relating to

the endorsing of warrants in Scotland, Ireland, and the Channel Islands.'

(t) *Freegard v. Barnes*, 7 Exch. R. 827. *R. v. Saunders*, 36 L. J. M. C. 87; L. R. 1 C. C. R. 75, *post*, p. 97.

therein expressed, (u) and it is clear the new clauses are not more extensive. It may be observed, that if a warrant be directed to several persons, any of them may execute it. (v)

Upon an indictment under the 9 Geo. 4, c. 31, it appeared that a warrant issued by commissioners of bankrupt was directed to 'J. Adams and W. Smith our messengers and their assistants;' and that the prosecutor, who was the assistant of Smith, having obtained the warrant from him, went in pursuit of the prisoner, who, on the prosecutor overtaking him, and saying he had the warrant, wounded the prosecutor with a stone; neither Smith nor Adams being present at the time, nor anywhere near the place, where the attempt to arrest occurred: it was objected that the prosecutor was not authorised by the warrant to arrest the prisoner except in the presence, actual or constructive, of either Adams or Smith, and that the word 'assistants' only extended to persons who went with Adams and Smith to assist in taking the prisoner. Williams, J., said, 'I think it is not sufficient that the prosecutor should have been deputed to act on the warrant by the messenger; and I think also, that to authorise him to act, he must derive his authority direct from the commissioners themselves. It appears to me that the term "assistant" would apply to any person, whom Adams or Smith directed to go in aid of them. It therefore remained uncertain who those assistants might be, till either Smith or Adams had named them; and I think that is not a legal execution of the warrant, unless it be executed in the presence, actual or constructive, of either Adams or Smith, who are named in it.' (x)

Where a warrant to arrest one Galliard for disobedience to a bastardy order was directed 'to the constable of the township of Nantwich, in the county of Chester, and all Her Majesty's officers of the peace in and for the said county,' and was given to the superintendent of police, and by him given to the police at Coppenhall, and it had been for a time in the possession of police-constable Dyson, and he and Sharman, being on duty in uniform as constables in Coppenhall, arrested Galliard under the warrant, but they had not the warrant in their possession at the time, it being at the station-house at Coppenhall, in the possession of their superior officer; it was held that this arrest was illegal, as the officers were bound to have the warrant ready to be produced, if required. (y)

In the preceding case, as no point seemed to have been raised upon any omission of the police to inform Galliard of the nature of the charge, the Court said, 'It may be presumed that they did tell him, not only that they arrested him under the warrant, but what the charge was. As they were obviously police-constables, we think that they were not bound in the first instance to produce the warrant at the time they made the arrest; but that, as this was not the charge of a felony, but rather in the nature of a civil

(u) Gladwell v. Blake, 5 Tyrw. 186.

(v) 1 Hale, 459.

(x) R. v. Whalley, 7 C. & P. 245. See Blatch v. Archer, Cowp. 63, where Aston, J., said, 'it is not necessary that the bailiff should be actually in sight, but he must be so near as to be near at hand, and acting in

the arrest.' R. v. Patience, 7 C. & P. 775. See this case, *post*, p. 104.

(y) Galliard v. Laxton, 2 B. & S. 363. The Court erroneously treated the 5 Geo. 4, c. 18, as not repealed. See R. v. Chapman, 12 Cox, C. C. 4, and R. v. Carey, 14 Cox, C. C. 214.

than of a criminal proceeding, the warrant ought to have been produced, if required, and that an arrest without such production would have been illegal.' (z)

The defendant was convicted in a penalty with costs, or to be imprisoned seven days. The penalty not having been paid, a warrant was issued under 11 & 12 Vict. c. 43, s. 25, for the defendant's apprehension, addressed 'to the constable of Gainsborough.' It was given to a county policeman to execute. While he was attempting to apprehend the defendant, the defendant resisted, and wounded the constable. It was held that a county policeman had no authority to execute it, it being addressed to the parish constable, and that the apprehension was therefore illegal, and the indictment for wounding the constable was quashed. (a)

The prisoner was indicted for maliciously wounding the prosecutor with intent to resist his apprehension for assaulting one W. P. The prosecutor having received a warrant, whereby he was commanded 'to apprehend the prisoner and to bring him before me to answer unto the said complaint (assaulting W. P.) and to be further dealt with according to law,' went in search of the prisoner, and brought him before the magistrate who granted the warrant, and another magistrate; he was ordered to find bail; he said he would not; upon which he was ordered to be committed; whilst the commitment was making out he made his escape; the prosecutor was ordered to go after him; there was no authority in writing; but in consequence of the verbal directions of the magistrates to the clerk, who was making out the commitment, the latter ordered the prosecutor to go after the prisoner; the prosecutor accordingly did so, and in attempting to apprehend the prisoner was cut by him with a knife; it was objected on the part of the prisoner that the count was not proved; for that the party having been taken before the magistrate, the warrant was *functus officio*; and the second taking was for having made his escape from the office; secondly, that the count was bad, as it did not follow that the assaulting W. P. was an offence for which the prisoner was liable to be apprehended; but Gaselee, J., thought the warrant continued in force, and that the second objection was upon the face of the record; and the jury having found the prisoner guilty, upon a case reserved, the conviction was held good. (b)

Where an officer endeavouring to execute process is resisted and killed, the crime will not amount to murder, unless the *process is legal*; but by this is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, and must issue in the ordinary course of justice from a Court or magistrate having jurisdiction in the case. (c) Therefore, though there may have been error or irregularity in the proceeding previous to the issuing of the process, it will be murder if the sheriff or other officer should be killed in the execution of it; for

(z) *Ibid.* R. v. Chapman, *ante*, p. 84.

(a) R. v. Saunders, 36 L. J. M. C. 87; L. R. 1 C. C. R. 75.

(b) R. v. Williams, R. & M. C. C. R. 387. As no time is usually prescribed for the execution of a warrant, it continues in force till

fully executed, though it be seven years after its date, provided the magistrate so long lives. *Dickenson v. Brown*, Peake, N. P. 344, Lord Kenyon, C. J.

(c) *Fost.* 311. *Baker's case*, 1 Leach, 112.

the officer to whom it is directed must, at his peril, pay obedience to it. (d) And for this reason, if a *capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. (e) But it seems that the writ, as well as the sheriff's warrant to the bailiff, must be produced. (f) So where upon an indictment for assaulting J. Evans in the execution of his office of sub-bailiff of a County Court, it appeared that the prisoner was arrested by Evans under a warrant, which was in the form authorised by the 19 & 20 Vict. c. 108, s. 61, for not having satisfied a judgment and costs; but the previous proceedings authorising the warrant were not proved; on a case reserved, it was held that these proceedings need not be proved; for the process of the County Court was as much a justification to the officer by virtue of the Act, as is a writ of execution out of a superior Court to a sheriff, and it is clear that the production of such a writ would be sufficient in a proceeding of this description for assaulting the sheriff or a bailiff without proof of the judgment. (g) So, where the defendants were indicted for an assault and it appeared that Messrs. Jones and Oakes, ironmasters, became bankrupts, and Bodle, a messenger of the District Court of Bankruptcy, in consequence of information that certain ironstone belonging to the bankrupts was lying in a boat, obtained a warrant from two justices to search for the property of Jones and Oakes, and went with this warrant to search the boat, whereupon the assault was committed. It was submitted that the bankruptcy and the proceedings under it must be proved; but Erle, J., held that the 6 Geo. 4, c. 16, s. 29, (h) rendered it unnecessary to shew the validity of the proceedings prior to obtaining the magistrate's warrant. (i) So, though the warrant of a justice of peace be not in strictness lawful, as if it do not express the cause with sufficient particularity; yet, if the matter be within his jurisdiction, the killing of the officer executing the warrant will be murder. (k) It may be observed also, that in all kinds of process, both civil and criminal, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice: (l) and therefore, in the case of an escape warrant, the person executing it was held under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it. (m)

(d) Fost. 311. 1 Hale, 457.

(e) Rogers's case, Cornwall Sum. Ass. 1735, ruled by Lord Hardwicke. Fost. 311, 312.

(f) R. v. Mead, 2 Stark. C. 205, an arrest upon mesne process.

(g) R. v. Davis, L. & C. 64, Williams, J., doubted on the ground that the statute seemed confined to civil cases.

(h) Repealed by the 12 & 13 Vict. c. 166.

(i) R. v. Roberts, 4 Cox, C. C. 145.

(k) 1 Hale, 459, 460. It is said, however, that this must be understood of a warrant containing all the essential requisites of one. 1 East, P. C. c. 5, s. 78, p. 310; and see R. v. Hood, *post*, p. 99, note (p) 1 Hale, 457. 1 Hawk. P. C. c. 31, s. 64. Fost. 312. 1 East, P. C. c. 5, s. 78, p. 310. Sir Henry Ferrers' case, Cro. Car. 371.

(l) 1 East, P. C. c. 5, s. 8, p. 310.

(m) Curtis's case, Fost. 135. And see Fost. 312.



So, where a borough rate is good on the face of it, a distress warrant issued upon it is valid, although the rate may have been made in part for by-gone expenses. (n)

A sergeant at mace in the city of London having authority, according to the custom of the city, by entry in the porter's book at one of the counters, to arrest one Murray for debt, arrested him between five and six in the evening of the 8th November, saying at the same time, 'I arrest you in the King's name, at the suit of Master Radford;' but he did not produce his mace: Murray resisted, and one of his companions killed the officer. Upon a special verdict it was urged that the arrest in the night was illegal, that the sergeant should have shewn his mace, and that a custom stated in the verdict to arrest without process first against the goods was illegal: but the objections were overruled. (o)

Upon an indictment for maliciously wounding, it appeared that George Hood having assaulted Brown, a sheriff's officer, who was endeavouring to arrest his father, Samuel Hood, under a *capias ad respondendum*, Brown applied to a magistrate for a warrant to apprehend George Hood for an assault, but not being at that time acquainted with his Christian name, the warrant, so far as it related to the name and description of the person committing the assault, was in the following terms, viz., 'to take the body of — Hood (leaving a blank for the Christian name) of, &c., by whatsoever name he may be called or known, the son of Samuel Hood, to answer, &c., on the oath of Francis Brown, an officer of the sheriff of the county of Wilts, for assaulting him in the execution of his duty.' This warrant was delivered to the tithing-man to execute, and he went to S. Hood's house, with Brown and others, to execute it; and Brown pointed out G. Hood to the tithing-man as the person on whom the warrant was to be executed, and upon attempting to apprehend him, he stabbed a person whom the tithing-man had charged to aid and assist. S. Hood had four sons who resided with him. It was objected that as the Christian name of George Hood was omitted, the warrant was illegal, and would not authorise his apprehension; and, upon a case reserved, the judges were unanimously of opinion that the warrant was bad, because it omitted the Christian name; it should have assigned some reason for the omission, and have given some particulars of George Hood, by which he might be distinguished from his brothers. (p)

A magistrate for the county of Herts issued his warrant, directing a constable to take John H., charged with stealing a mare. Armed with this warrant, the constable went to Smithfield, and there arrested Richard H., who was the party against whom information had been given, and against whom the magistrate intended to issue his warrant, and who was supposed to be called John H.; his name, however, was really Richard H., John H. being the name of his father. There was no proof that a felony had been committed. The person who made the charge before the magistrate pointed out Richard H. as the man who had stolen the mare, and a person

(n) *Jones v. Johnson*, 5 Exch. R. 862.

(o) *Mackally's case*, 9 Co. 65 b

(p) *R. v. Hood*, R. & M. 281. See *Hoye*

*v. Bush*, *infra*, note (q), and the observations of Coleridge, J. *Howard v. Gossett*, 10 Q. B.

387, *et seq.*

present said that his name was John H., and there was clearly evidence to go to the jury that Richard H. was the man intended to be taken up. Coltman, J., told the jury that the law would not justify the constable's act, the warrant being against John and not against Richard, although Richard was the party intended to be taken; that a person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him, unless he has called himself by the wrong name; that a constable may, in many cases, take up a person on a charge of felony by virtue of his office of constable, and without any warrant from a magistrate; but that he can only do so within the district for which he is chosen constable. The jury having found a verdict against the constable, the Court held that the direction was right. (q)

Where a warrant commanded the constable to apprehend a prisoner, and bring him before a justice 'to answer to all such matters and things as on Her Majesty's behalf shall be objected against him on oath by M. A. W., for an assault committed on her;' it was held bad, for it did not state any information on oath that any assault had been committed. (r) And where a warrant of a judge of the Court of Queen's Bench directed certain officers to apprehend a person 'and him safely keep, to the end that he may become bound and find sufficient sureties to answer' an indictment for a conspiracy, 'and to be further dealt with according to law;' it was held that the warrant was bad for not directing that the party should be taken before some judge or justice for the purpose of finding sureties. (s)

Where a warrant to distrain for a borough rate was signed and sealed by two justices, and delivered to the town clerk for the purpose of having the corporate seal affixed thereto, and he altered the date of it from the 10th to the 14th of August, with the assent and direction of the justices, and the same was afterwards re-signed and re-sealed, and the corporate seal affixed thereto, it was held that the warrant was good; for the date was altered whilst it was in the possession of the justices before it was issued, and they were clearly at liberty to alter it at that time. (t) Where in the body of a warrant of distress the justices were described as 'two of Her Majesty's justices of the peace for the said borough and city, and one of us being the mayor of the said borough and city,' and the warrant was signed by the two; it was objected that it did not appear in the body of the warrant that one of them was mayor at the time the warrant issued; but the objection was overruled; for there was no authority for saying that the signature might not be looked at and considered as part of the warrant. (u) It was objected on error, that as under the signatures were the words 'justices of the said city and borough,'

(q) *Hoye v. Bush*, 1 M. & Gr. 775. As there was no authority to apprehend Richard H. under the warrant, and the constable was out of his district, he was in the same situation as a private individual. He might have defended himself by proving that the felony had been committed by Richard H. See *ante*, p. 99, and per Tindal, C. J. 1 M. & Gr. 780. But in a civil action a writ of execution must correspond with the judg-

ment in the name of the defendant, although he be therein described by a wrong one, and the sheriff is bound notwithstanding to execute the writ. *Reeves v. Slater*, 7 B. & C. 486. *Fisher v. Magnay*, 6 Sc. N. R. 588.

(r) *Candle v. Seymour*, 1 Q. B. 889.

(s) *R. v. Downey*, 7 Q. B. 281.

(t) *Jones v. Johnson*, 5 Exch. 862.

(u) *Ibid*.

the warrant was signed by the mayor as a justice, and he could not afterwards sign it as mayor; but it was held that he might act in both characters, and that the warrant was not less the warrant of the mayor because it was also that of the justice. (v) Where a distress warrant had in the margin 'Borough and City of Lichfield,' and described the justices as 'justices of the peace for the said city and borough,' it was objected that the warrant did not shew that they were acting within their jurisdiction, as it did not use the ordinary words 'in and for;' but it was held that it did appear to have been issued within their jurisdiction; for the venue in the margin might be taken as constituting the place of making the warrant. (w) Where a warrant of distress ran, 'if within the space of five days next after such distress' the money be not paid, 'that then you do sell the said goods;' it was objected that it was bad for not limiting any time within which the goods were to be sold pursuant to the 27 Geo. 3, c. 20, s. 1; but the warrant was held good; for the obvious meaning of that section is to fix the time within which the party distrained on may save his goods by tendering the amount due with the costs, and here the warrant did specify five days as the time allowed for payment, and then the officer is directed to sell. (x)

There is a grand distinction between the warrants of magistrates and others who act by special statutory authority, and out of the course of the common law, and such warrants as are to be regarded as the mandate of a superior Court acting according to the course of the common law. In the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought to shew their authority on the face of them by direct averment, or reasonable intendment. Not so the process of superior Courts acting by the authority of the common law. The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so, and nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged. (y)

It appears to have been formerly a very common practice for sheriffs to issue *blank warrants*, notwithstanding their illegality. The prisoner Stockley, about Lady-day, 1753, had been arrested by Welch, the deceased, at the suit of one Bourn, but was rescued; and he afterwards declared, that if Welch offered to arrest him again, he would shoot him. A writ of rescue was made out at the suit of Bourn, and carried to the office of a Mr. Deacle (who acted for the under-sheriff of Staffordshire) to have warrants made out upon such writ. The custom of the under-sheriff was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion required. Deacle made out a warrant against Stockley upon one of these blank pieces of paper, and delivered it to Welch, who inserted therein the

(v) S. C. 7 Exch. R. 452.

(w) Ibid.

(x) Ibid.

(y) Framed from the judgment of Parke, B., *Howard v. Gossett*, 10 Q. B. 452, and cases there cited.

names of Thomas Clewes and William Davil, on the 12th of July, 1753. On the 19th of September following, Welch, Davil, Clewes, and one Howard, the person to whom Stockley had declared he would shoot Welch, went to arrest Stockley on this warrant. Clewes and Davil, having the warrant, went into Stockley's house first, and called for refreshment; but, an alarm being given that Welch was coming, the door was locked; upon which Clewes arrested Stockley on this illegal warrant, who thereupon fell upon Clewes, and thrust him out of doors, but kept Davil within, and beat him very dangerously, he crying out murder. On hearing this, Welch and Howard endeavoured to get into the house; and Welch broke open the window, and had got one leg in, when Stockley shot and killed him. Stockley was tried for murder, when the jury expressly found that the deceased attempted to get into the house to assist in the arrest of Stockley. Howard, Clewes, and Davil, being dead, their depositions before the coroner were read, and minutes were taken of the above facts for a special verdict: but, to save expense, the case was referred to the judges of the King's Bench, who certified that the offence amounted, in point of law, only to manslaughter. (z)

This practice of issuing blank warrants was reprobated in a more recent case, where the sheriff having directed a warrant to A. by name, and all his other officers, the name of another of the sheriff's officers, B., was inserted after the warrant was signed and sealed by the sheriff; and, therefore, an arrest by B. was holden illegal. (a) And in another case it was considered that the arrest was illegal, where the warrant was filled up after it had been sealed. (b) But if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems that the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. Banks and Powell had a warrant from the sheriff of Salop upon a writ of possession against the prisoner's house; and their names were interlined after the warrant was sealed, but before it was sent out of the office. The prisoner refused them admittance; and, on their bursting open the door, shot at Banks, and wounded him severely. Upon an indictment for wilfully shooting, upon the 43 Geo. 3, c. 58, objection was taken that the warrant gave Banks and Powell no authority, because their names were inserted after it was sealed. But the prisoner having been convicted, upon a case reserved, the judges held that the conviction was right. (c) So where a magistrate who kept by him a number of blank warrants ready signed, on being applied to, filled up one of them, and delivered it to the officer, who, in endeavouring to arrest the party, was killed; it was held that this was murder in the person killing the officer. (d)

It may be proper to remark a circumstance in the preceding case of Stockley, which has been thought to deserve consideration, (e)

(z) Stockley's case, 1772, Sergeant Forster's MS. 1 East, P. C. c. 5, s. 78, pp. 310, 311. The case was so decided without argument.

(a) Housin v. Barrow, 6 T. R. 122. And see a case referred to by Lord Kenyon, 6 T. R. 123.

(b) Stevenson's case, 19 St. Tr. 846.

(c) R. v. Harris, East. T. 1801. MS. Bayley, J.

(d) Per Lord Kenyon, in R. v. The Inhabitants of Winwick, 8 T. R. 454, who there mentions it as a case determined by the judges some years before.

(e) 1 East, P. C. c. 5, s. 78, p. 311.

namely, that he had before deliberately resolved upon shooting Welch in case he offered to arrest him again, which in all probability it might be his duty to do. It certainly resembles a former case, where, upon some officers breaking open a shop-door to execute an escape warrant, the prisoner, who had previously sworn that the first man that entered should be a dead man, killed one of them immediately by a blow with an axe. A few of the judges to whom this case was referred, were of opinion that this would have been murder, though the warrant had not been legal, and though the officers could not have justified the breaking open the door, upon the grounds of the brutal cruelty of the act, and of the deliberation manifested by the prisoner, who, looking out of a window with the axe in his hand, had sworn, before any attempt to enter the shop, that the first man that did enter should be a dead man. (*f*) But in another case, prior to either of these, where the cruelty and the deliberation were of a similar kind, the crime was considered as extenuated by the illegality of the officer's proceeding. A bailiff having a warrant to arrest a person upon a *capias ad satisfaciendum*, came to his house, and gave him notice; upon which the person menaced to shoot him if he did not depart: the bailiff did not depart, but broke open the window to make the arrest, and the person shot him, and killed him. It was holden that this was not murder, because the officer had no right to break the house; but that it was manslaughter, because the party knew the officer to be a bailiff. (*g*)

(*f*) *Curtis's case*, 1756. *Fost.* 135.

(*g*) *Cook's case*, 1 Hale, 458. *Cro. Car.* 537, *W. Jones*, 429. And see the American case of *Rafferty v. P.*, cited *ante*, p. 86. Upon these cases the following very sensible observations are made in *Roscoe's Cr. Ev.* 707, 708: 'These decisions would appear to countenance the position, that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter. In *Thompson's case*, 1 R. & M. 80, where the officer was about to make an arrest on an insufficient charge, the judges adverted to the fact that the prisoner was in such a situation that he could not get away. In these cases it would seem to be the duty of the party whose liberty is endangered to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So also where, as in *Stockley's case*, *supra*, note (*z*), and *Curtis's case*, *supra*, note (*f*), the party appears

to have acted from motives of express malice, there seems to be no reason for withdrawing such cases from the operation of the general rule, that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, 'it may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it, exactly on the same footing as any other wrong doer.' 1 East, P. C. 328. It may be remarked that this question is fully decided in the Scotch law, the rule being as follows:—In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder, if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained. *Alison's Princ. Cr. Law of Scotland*, 25. If, says Baron Hume, instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder. 1 Hume, 250. The distinction appears to be, says Mr. Alison, that 'the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error was not known to

Upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that a constable having a warrant to apprehend the prisoner, gave it to his son, who went in pursuit of the prisoner in company with his brother; the father stayed behind; they found the prisoner lying under a hedge, and when they first saw him he had a knife in his hand running the blade of it into the ground; he got up from the ground to run away, and the son laid hold of him, and he stabbed the son with the knife; the father was in sight at about a quarter of a mile off. Parke, B., 'The arrest was illegal, as the father was too far off to be assisting in it; and there is no evidence that the prisoner had prepared the knife beforehand to resist illegal violence. If a person receives illegal violence, and he resists that violence with anything he happens to have in his hand, and death ensues, that would be manslaughter. If the prisoner had taken out this knife on seeing the young man come up, it might be evidence of previous malice, but that is not so, as we find that the knife was in his hand when the young man first came in sight.' (h)

**As to notice of the authority to arrest.**<sup>2</sup>—The parties whose liberty is interfered with must have due notice of the officer's business; or their resistance and killing of such officer will amount only to manslaughter. (i) Thus, where a bailiff pushed abruptly and violently

the party resisting; whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only.' Alison's Princ. Cr. Law of Scotland, 28. In such cases it seems to me that it may be well deserving of consideration whether the first inquiry ought not to be whether or no the act done was caused by the illegal apprehension. If the act done arose from other causes, and had no reference to the illegal arrest, as if it arose from previous ill will, it should seem that the illegality of the arrest ought not to be taken into consideration, because it was not the cause of the act, and therefore could not be truly said to have afforded any provocation for it. Such a case would be like the cases where blows have been given by the deceased, but the fatal blow has been inflicted in consequence of previous ill will. (See *R. v. Thomas*, ante, p. 52; *R. v. Kirkham*, ante, p. 52.) From the observations of Parke, B., in *R. v. Patience*, infra, note (h), I infer that the very learned Baron was of opinion that if there were previous malice, the illegal arrest would not reduce the crime to manslaughter; because the previous malice was the cause of the act, and not the illegality of the arrest. In such an inquiry the fact that the prisoner was ignorant at the time that

the arrest was illegal would be most material, because it would almost conclusively shew that the act did not arise from that cause. It should also be observed, that if 'one has a legal and illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has in his justification,' per Holt, C. J. *Grenville v. The College of Physicians*, 12 Mod. 386, and see *Crowther v. Ramsbottom*, 7 T. R. 654; *The Governors of Bristol Poor v. Wait*, 1 Ad. & E. 264; so it might be contended that if the party apprehended had committed a felony, as he might be apprehended by any individual without a warrant, the apprehension by a constable under a defective warrant would not be illegal, as he might justify the arrest as a private individual. See per Tindal, C. J., in *Hoye v. Bush*, 1 M. & Gr. 775, ante, p. 100, note (g). So also as a constable has authority to apprehend any person within his district, whom he has reasonable ground to suspect of having committed a felony [*Beckwith v. Philby*, ante, p. 74, note (u)]; in such a case also it might be contended that he might justify the arrest, although in fact he did apprehend under an illegal warrant. C. S. G.<sup>1</sup>

(h) *R. v. Patience*, 7 C. & P. 775.

(i) 1 Hale, 458, *et seq.* 1 Hawk. P. C. c. 31, ss. 49, 50. *Fost.* 310.

#### AMERICAN NOTES.

<sup>1</sup> See Bishop, ii. s. 699 (3); *Galvin v. S.*, 6 Coldw. 283; *Brooks v. C.*, 61 Pa. 352; 100 Am. D. 645. *Roberts v. S.*, 14 Mo. 138. See *contra C. v. Carey*, 12 Cush. (Mass.) 246; *Rafferty v. P.*, ante, p. 86.

<sup>2</sup> Whether the officer must have given some notice of his being an officer, and how

small a circumstance will be sufficient notice, see Bishop, vol. ii. s. 654, citing *R. v. Gordon* (Lord) 1 East, P. C. 315, *post.* Mr. Bishop suggests that ignorance that the officer was an officer would afford an excuse; but none of the English cases go so far.

into a gentleman's chamber early in the morning, in order to arrest him, but did not tell his business, nor use words of arrest, and the party not knowing that the other was an officer, in the first surprise, snatched down a sword, which hung in his room, and killed the bailiff; it was ruled to be manslaughter. (*j*) But it will be otherwise, if the officer and his business be known; (*k*) as where a man said to a bailiff who came to arrest him, 'Stand off, I know you well enough, come at your peril,' and, upon the bailiff taking hold of him, ran the bailiff through the body and killed him, it was held to be murder. (*l*) This will apply as well to a special bailiff as to a known officer; but where the party does not show by his conduct that he is acquainted with the officer and his business, material distinctions arise as to notice of a known officer, and one whose authority is only special.

Where a party is apprehended in the commission of an offence, or upon fresh pursuit afterwards, notice is not necessary, because he must know the reason why he is apprehended. (*m*)

Where upon an indictment for maliciously wounding, it appeared that the assistant to the head keeper of Sir R. S. went with five or six assistants towards a covert of Sir R. S., where they heard guns; they then went towards the place, and rushed in at the poachers to take them; the prosecutor saw six persons in the wood, and he ran after them; they got into a field about six yards off; they then ranged themselves in a row, the prosecutor being five or six yards from them, on the edge of the plantation, and he heard one of them say, 'The first man that comes out I'll be d——d if I don't shoot him;' upon which the prosecutor drew his pistol, cocked it, and ran out: they all ran away together; the prosecutor followed them, and when they had run about fifty yards they stood; they had all turned round; one of them shot at the prosecutor, who was running to him; the prosecutor was wounded; the men said nothing to the prosecutor before he was shot, nor he to them; it was objected, that, inasmuch as the prosecutor's authority to apprehend them was derived from the act creating the offence, it was incumbent upon him to give notice to them: the objection was overruled: and, upon a case reserved, the judges were of opinion that the circumstances constituted sufficient notice. (*n*) So where a servant of Sir T. W. was out with his gamekeeper at night, and they heard two guns fired, and went towards the place, and got into a covert, and saw some men there who ran away, and the servant pursued them, and got close up to one of them, and made a catch at his legs, and was immediately shot in the side; Parke, B., said, 'Where parties find poachers in a wood, they need not give any intimation by words that they are gamekeepers, or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose when he sees another at his heels?' (*o*)

(*j*) 1 Hale, 470, case at Newgate, 1657.  
And see Kel. 136.

(*k*) Mackally's case, 9 Co. 69.

(*l*) Pew's case, Cro. Car. 183. 1 Hale, 458.

(*m*) R. v. Howart's, R. & M. 207, *ante*,

p. 80. See R. v. Woolmer, R. & M. 384, *ante*, p. 86.

(*n*) R. v. Payne, R. & M. 378. See R. v. Fraser, R. & M. 419, *ante*, p. 79, note (*i*).

(*o*) R. v. Davis, 7 C. & P. 785, Parke, B.

See R. v. Taylor, 7 C. & P. 266. Vaughan, J.

With regard to private persons interfering, as they may do, in case of sudden affrays, in order to part the combatants, and prevent bloodshed, it is quite necessary that they should give express notice of their friendly intent; otherwise the persons engaged may, in the heat and bustle of the affray, imagine that they come to act as parties. (*p*)

With regard to such ministers of justice as, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties engaged should have some notice of the intent with which they interpose; for the reason which was mentioned in relation to private persons; lest the parties engaged should, in the heat and bustle of an affray, imagine that they come to take a part in it. (*q*) But, in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged, to bear the office he assumes, the law will presume that the party killing had due notice of his intent; especially if it be in the daytime. (*r*) In the night some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient. (*s*) Killing a watchman in the execution of his office is not the less murder for being done in the night; and the killing of an officer who arrests on civil process may be murder, though the arrest be made in the night; and in the case of an affray in the night where the constable, or any other person who comes to aid him to keep the peace, is killed, after the constable has commanded in the King's name to the keeping of the peace, such killing will be murder; for though the parties could not discern or know him to be a constable, yet if it were said at the time that he was such officer, resistance was at their peril. (*t*) Therefore though the saying of a learned judge, 'That a constable's staff will not make a constable,' is admitted to be true; yet if a minister of justice be present at a riot or affray within his district, and in order to keep the peace produce his staff of office, or any other known ensign of authority, in the daytime when it can be seen, it is conceived that this will be a sufficient notification of the intent with which he interposes; and that, if resistance be made after this notification, and he or any of his assistants killed, it will be murder in everyone who joined in such resistance. (*u*) For it seems, that in the case of a public bailiff, a bailiff *juratus et cognitus*, acting in his own district, his authority is considered as a matter of notoriety, and, upon this ground, though the warrant by which he was constituted bailiff

(*p*) Fost. 310, 311.

(*q*) Fost. 310. Kel. 66, 115.

(*r*) 1 Hale, 460, 461. Fost. 310, 311. So in the Sissinghurst-house case, 1 Hale, 462, 463, it was resolved that there was sufficient notice that it was the constable before the man was killed:—1. Because he was constable of the same vill. 2. Because he notified his business at the door before the

assault, viz., that he came with the justice's warrant. 3. Because, after his retreat, and before the man was slain, he commanded the peace; and, notwithstanding, the rioters fell on and killed the party. See the case fully stated, *post*, p. 119, *et seq.*

(*s*) 1 Hale, 461. Fost. 311.

(*t*) 9 Co. 66 *a*.

(*u*) Fost. 311.



be demanded, he need not show it; (v) and it is sufficient if he notify that he is the constable, and arrest in the King's name. (w) And this kind of notification by implication of law will hold also in cases where public officers, having warrants, directed to them as such, to execute, are resisted, and killed in the attempt. (x) Thus, where a warrant had been granted against the prisoner by a justice of peace for an assault, and directed to *the constable of Pattishal*, and delivered by the person who had obtained it to the deceased, to execute as constable of the parish, and it appeared that the deceased went to the prisoner's house in the daytime to execute the warrant, had his constable's staff with him, and gave notice of his business, and further, that he had before acted as constable of the parish, and was generally known as such: it was determined that this was sufficient evidence and notification of the deceased being constable, although there were no proof of his appointment, or of his being sworn into the office. (y)

It is laid down in one case, that if, upon an affray, the constable, or others in his assistance, come to suppress it, and preserve the peace, and be killed in executing their office it is murder in law, although the murderer knew not the party killed, and though the affray were sudden; because he set himself against the justice of the realm. (z) It is said, however, that in order to reconcile this with other authorities, it seems that the party killing must have had *implied notice* of the character in which the peace officer and his assistants interfered, though not a personal knowledge of them. (a) For it is elsewhere laid down, that if there be a sudden affray, and the constable come in, and, endeavouring to appease it, be killed by one of the company who knew him, it is murder in the party killing, and in such of the others as knew the constable, and abetted the party in the fact; but only manslaughter in those who knew not the constable; (b) and that others continuing in the affray, neither knowing the constable, nor abetting to his death, would not be guilty even of manslaughter. (c) But these positions do not apply to an affray deliberately engaged in by parties determined to make common cause, and to maintain it by force. (d)

It is, however, agreed, that if a bailiff or other officer be resisted in the regular discharge of his duty in executing process against a party, and a third person, even the servant or friend of the party

(v) 1 Hale, 458, 461, 583. Mackally's case, 9 Co. 69 a. But it is otherwise as to the writ or process against the party. Both a public and private bailiff, where the party submits to the arrest and demands it, are bound to shew at whose suit, for what cause, and out of what court the process issues, and where returnable. 6 Co. 54 a. 9 Co. 69 a; but it will be no excuse that he did not tell the party, if the party resisted so as not to give time for telling, 9 Co. 69 a. And in no case is the bailiff required to part with the possession of the warrant; neither is a constable, whether acting within or without his jurisdiction. 1 MS. Sum. 250. 1 East, P. C. c. 5, s. 84, p. 319. By a known bailiff is meant one who is commonly known to be so;

it is not necessary that he should be known to the party to be arrested. 9 Co. 69 b.

(w) 1 Hale, 583.

(x) 1 East, P. C. c. 5, s. 81, p. 315.

(y) *R. v. Gordon*, Northampton Spr. Ass. 1789, *cor.* Thomson, B., afterwards considered at a conference of all the judges, 26th June, 1789. See 1 East, P. C. c. 5, s. 81, p. 315.

(z) *Young's case*, 4 Co. 40 b. 3 Inst. 52.

(a) 1 East, P. C. c. 5, s. 82, p. 316.

(b) 1 Hale, 438, 446, 461. Kel. 115, 116.

(c) 1 Hale, 446. Lord Hale adds, *quod tamen quare*, but (as it is said, 1 East, P. C. c. 5, s. 82, p. 316) perhaps over cautiously, if in truth there were no abetment.

(d) See as to the cases of that kind, vol. i. p. 167, *et seq.*

resisting, come in and take part against the officer, and kill him, it will be murder, though he knew him not. (e) But it is suggested, that in this case, in order to make it murder in the servant or friend, the party whom they came in to assist must have had due notice of the officer's authority; and that if the offence would not have been murder in the party himself resisting for want of such notice, neither would it in the servant or friend under the like ignorance. (f) The law upon this point may, perhaps, hardly seem to be reconcileable with that above-mentioned, of a person not knowing the constable, and killing him in an affray; but it is defended on the principle, that every person wilfully engaging, in cool blood, in a breach of the peace, by assaulting another, instead of endeavouring to assuage the dispute, is bound first to satisfy himself of the justice of the cause he espouses at his peril. (g) And, upon this principle, if a stranger, seeing two persons engaged, one of them a bailiff attacking the other with a sword, and the other resisting an arrest by such bailiff, interfere between them without knowing the bailiff, for the express purpose of defending the party attacked against the bailiff, he must abide the consequences at his peril; but if he interfere, not for the purpose of aiding one party against the other, but with intent only to preserve the peace, and prevent mischief, and in so doing happen to kill the bailiff, the case would possibly fall under a different consideration. (h)

In all cases, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity. (i) In a case where an outer door had been broken open by two constables and a gamekeeper, to execute a warrant granted under the 22 & 23 Car. 2, c. 25, s. 2, to search for, and seize any guns, &c. for destroying game; and it appeared that the door was broken open without the party having been previously requested to open it; the Court held, that, in a case of misdemeanor, a previous demand of admittance was clearly necessary, before an outer door was broken open. Abbot, C. J., said, 'it is not at present necessary to decide how far in a case of a person charged with felony it would be necessary to make a previous demand of admittance, before you could justify breaking open the outer door of the house; because I am clearly of opinion, that, in the case of a misdemeanor, such previous demand is requisite.' Bayley, J., said, generally, 'even in the execution of criminal process, you must demand admittance, before you can justify breaking open the outer door. That point was mentioned in the judgment of the Court in *Burdett v. Abbott*.' (j) The question

(e) 1 Hawk. P. C. c. 31, s. 57, Keb. 87. 4 Co. 40 b. 1 East, P. C. c. 5, s. 82, p. 316.

(f) 1 East, P. C. c. 5, s. 82, p. 316.

(g) 1 Hawk. P. C. c. 31, s. 59. 1 East, P. C. c. 5, s. 82, pp. 316, 317, where the grounds upon which the law in each of these cases may be supported, and considered as reconcileable, are more fully stated.

(h) See the case of Sir C. Standlie and Andrews, Sid. 159, where Andrews, under similar circumstances, was holden not to be

guilty of murder. This case is differently reported by Kelyng; and Keble, reporting the same case very shortly, says:—It was adjudged, that if any casually assist against the law, and kill the bailiff, it is murder, especially if he knew the cause. 1 Keb. 584; and see 1 East, P. C. c. 5, s. 83, p. 318.

(i) Fost. 320. 2 Hawk. P. C. c. 14, s. 1. 1 East, P. C. c. 5, s. 87, p. 324.

(j) *Launock v. Brown*, 2 B. & A. 592.

as to what should be considered as due notice was much considered in a case where two officers went to the workshop of a person, against whom they had an escape warrant; and finding the shop door shut called out to the person, and informed him that they had an escape warrant against him, and required him to surrender, otherwise they said they would break open the door; and, upon the person's refusing to surrender, they broke open the door, and one of their assistants was immediately killed. Nine of the judges were of opinion, that no precise form of words was required in a case of this kind; and that it is sufficient if the party has notice that the officer comes not as a mere trespasser, but claiming to act under a proper authority. The judges who differed, thought that the officers ought to have declared, in an explicit manner, what sort of warrant they had; and that an escape does not, *ex vi termini*, nor in the notion of law, imply any degree of force, or breach of the peace; and, consequently, that the prisoner had not due notice that they came under the authority of a warrant grounded on the breach of the peace; and that, for want of this due notice, the officers were not to be considered as acting in discharge of their duty, but as mere trespassers. (*k*)

In the case of a *private or special bailiff*, either it must appear that the party knew that he was such officer, as where the party said, 'Stand off, I know you well enough; come at your peril;' or, that there was some such notification thereof that the party might have known it, as by saying, 'I arrest you.' These words, or words to the like effect, give sufficient notice; and if the person using them be a bailiff, and have a warrant, the killing of such officer will be murder. (*kk*) A private bailiff ought also to shew the warrant upon which he acts, if it is demanded; (*l*) and with respect to the writ or process against the party, both the public and private bailiff, in case the party submit to the arrest and make the demand, are bound to shew at whose suit, and for what cause the arrest is made, out of what court the process issues, and when and where returnable. (*m*) In no case, however, is he required to part with the warrant out of his own possession; for that is his justification. (*n*)

It may be observed generally, that where an officer, in executing his office, proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess; and if he be killed, the offence will amount to no more than manslaughter in the person whose liberty is so invaded. (*o*) He should be careful, therefore, to execute process only within the jurisdiction of the Court from whence it issues; as, if it be executed out of such jurisdiction, the killing the officer attempting to enforce the execution of it will be only manslaughter. (*p*) But, if the process be executed

(*k*) Curtis's case, *Fost.* 135.

(*kk*) 1 Hale, 461. Mackally's case, 9 Co.

69 b.

(*l*) 1 Hale, 583. That is, the warrant by which he is constituted bailiff; which a bailiff or officer, *juratus et cognitus*, need not show upon the arrest, 1 Hale, 458. And see 1 Hale, 459.

(*m*) 1 Hale, 458, note (*g*). 6 Co. 54 a.

9 Co. 69 a.

(*n*) 1 East, P. C. c. 5, s. 83, p. 319.

(*o*) *Fost.* 312.

(*p*) 1 Hale, 458, 459. 1 East, P. C. c. 5, s. 80, p. 314.

within the jurisdiction of the Court or magistrate from whence it is issued, it will be sufficient, though it be executed out of the vill of the constable, provided it be directed to a particular constable by name, or even by his name of office. (*q*) And the officer must also be careful not to make an arrest on a *Sunday*, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority. (*r*) But process may be executed in the night-time, as well as by day. (*s*)

The right of officers to break open windows or doors, in order to make an arrest, has been a subject of some litigation; but many of the points have been settled, and require to be shortly noticed. And the general rule must be kept in mind, that in every case, in which doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity. (*t*)

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced, after the notification, demand, and refusal which have been mentioned. (*u*) So, where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken. (*v*) And it is also settled, upon unquestionable authorities, that where an injury to the public has been committed, in the shape of an insult to any of the Courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it. (*w*) And the officer may act in the same manner upon a *capias utlagatum*, or *capias pro fine*, (*x*) or upon a *habere facias possessionem*. (*y*) The same force may be used where a forcible entry or detainer is found by inquisition before justices of peace, or appears upon their view; (*z*) and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on any statute which gives the whole or any part of such penalty, to the King. (*a*) But in this latter case the officer executing the warrant must, if required, shew the same to the person whose goods and chattels are distrained, and suffer a copy of it to be taken. (*b*)

But though a felony has been actually committed, yet a bare suspicion of guilt against the party will not authorise a proceeding to

(*q*) 1 Hale, 459. 2 Hawk. P. C. c. 13, s. 27, 30. 1 East, P. C. c. 5, s. 80, p. 314. And see the statutes, *ante*, p. 93.

(*r*) 29 Car. 2, c. 7. 1 East, P. C. c. 5, s. 88, p. 324, 325. The statute makes void all process, warrants, &c., served and executed on a Sunday, except in the cases mentioned in the text.

(*s*) 9 Co. 66 *a*. 1 Hale, 457. 1 Hawk. P. C. c. 31, s. 62.

(*t*) Fost. 320. 2 Hawk. P. C. c. 14, s. 1. *Ante*, p. 108.

(*u*) Fost. 320. 1 Hale, 459. And see 2 Hawk. P. C. c. 14, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to

have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person.

(*v*) Fost. 320. 1 Hale, 459. 2 Hawk. P. C. c. 14, s. 3. Curtis's case, Fost. 135.

(*w*) *Burdett v. Abbott*, 14 East, 157, where the process of contempt proceeded upon the order of the House of Commons; and see *Semayne's case*, Cro. Eliz. 909; and *Brigg's case*, 1 Rol. Rep. 336.

(*x*) 1 Hale, 459. 2 Hawk. P. C. c. 14, s. 4.

(*y*) 1 Hale, 458. 5 Co. 95 *b*.

(*z*) 2 Hawk. P. C. c. 14, s. 6.

(*a*) 2 Hawk. P. C. c. 14, s. 5.

(*b*) 27 Geo. 2, c. 20.

this extremity, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion. (c) For where a person lies under a probable suspicion only, and is not indicted, (d) it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him, cannot be justified; (e) or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty. (f) But a different doctrine appears to have formerly prevailed upon this point; by which it was held, that if there were a charge of felony laid before the constable, and reasonable ground of suspicion, such constable might break open doors, though he had no warrant. (g) A plea justifying the entering a house without warrant, the door being open, on suspicion of felony, ought distinctly to shew the purpose for which the house was entered, viz., either to search for the stolen property or to arrest the plaintiff, as well as that there was reason to believe that the stolen property, or the plaintiff, was there. (h)

It is said, that if there be an affray in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace, and prevent the danger: (i) and it is also said, that if there be disorderly drinking or noise in a house at an unreasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder. (j) And further, that where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers in either case, he may justify breaking open the doors. (k)

But this mode of proceeding, by breaking the doors of the party, is founded upon the necessity of measures for the public weal, and is not permitted to the particular interest of an individual. In civil suits, therefore, the principle that a man's house is his castle, for safety and repose to himself and his family, is admitted; and, accordingly, in such cases, an officer cannot in general justify the breaking open an outward door or window to execute the process. (l) If he do so, he will be a trespasser; and if the occupier of the house resist him, and in the struggle kill him, the offence will be only manslaughter; (m) for if the occupier of the house do not know him to be an officer, and have reasonable ground of suspicion

(c) *Fost.* 321.(d) *Ante*, p. 83.(e) 2 *Hawk. P. C. c.* 14, s. 7.(f) 1 *East, P. C. c.* 5, s. 87, p. 322.(g) 1 *Hale*, 583. 2 *Hale*, 92. 13 *Ed.* 4.

9 a.

(h) *Smith v. Shirley*, 3 *C. B.* 142.(i) 2 *Hale*, 95.(j) 2 *Hale*, 95; and it is added, 'This

is constantly used in London and Middlesex.'

(k) 2 *Hawk. P. C. c.* 14, s. 8.(l) *Cook's case*, *Cro. Car.* 537. *Fost.* 319. But the sheriff may, if necessary, in order to execute a writ of *habere facias possessionem*, break open the outer door if he be denied entrance by the tenant. *Semayne's case*, 5 *Co.* 91.(m) *Ibid.*

that the house is broken with a felonious intent, the killing such officer will be no felony. (n)

It has been considered, however, that this rule of every man's house being his castle has been carried as far as the true principles of political justice will warrant, and that it will not admit of any extension. (o) It should be observed, therefore, that it will apply only to the breach of *outward* doors or windows; to a breach of the house for the purpose of arresting the occupier or any of his family; and to arrests in the first instance.<sup>1</sup>

*Outward* doors or windows are such as are intended for the security of the house against persons from without endeavouring to break in. (p) These are protected by the privilege which has been before mentioned; but if the officer find the outward door open, or it be opened to him from within, he may then break open any *inward* door, if he find that necessary in order to execute his process. (q) Thus, it has been holden that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger. (r) And in one case it was decided, that a sheriff's officer in execution of *mesne process*, who had first gained peaceable entrance at the outer door of the house of A., might break open the windows of the room of B., a person residing in such house; B. having refused to open the door of the room, after being informed by the officer that he had a warrant against him. (s) But it seems that if the party, against whom the process is issued, be not within the house at the time, the officer can only justify breaking open inner doors in order to search for him, after having first demanded admittance. (t) Though in case the person or the goods of the defendant, are contained in the house which the officer has entered, he may break open any door within the house without any further demand. (u) If, however, the house is the house of a stranger, and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as, if they are not, he will not be justified. (v)

In a case where an outward door was in part open (being divided into two parts, the lower hatch of which was closed, and the upper part open), and the officer put his arm over the hatch, to open the part which was closed, upon which a struggle ensued between him

(n) 1 Hale, 458. 1 East, P. C. c. 5, s. 87, 8 Taunt. 250. See *Hodgson v. Towing*, 5 p. 321, 322. Dowl. P. R. 410.

(o) Fost. 319, 320.

(p) Fost. 320.

(q) 1 Hale, 458. 1 East, P. C. c. 5, s. 87, p. 323.

(r) *Lee v. Gansel*, Cowp. 1.

(s) *Lloyd v. Sandilands*, 2 Moore, 207.

(t) *Ratcliffe v. Burton*, 3 Bos. & Pull. 223.

(u) Per Gibbs, J., in *Hutchinson v. Birch* and another, 4 Taunt. 619.

(v) *Cook v. Birt*, 5 Taunt. 765, Johnson v. Leigh, 6 Taunt. 240. *Post*, p. 114.

#### AMERICAN NOTE.

<sup>1</sup> See the American cases cited in Bishop, i. s. 859, and Wharton on Homicide, 944, *et seq.*

and a friend of the prisoner, and, the officer prevailing, the prisoner shot at and killed him; it was held to be murder. (*u*)

The privilege only extends to the dwelling-house, but it should seem that within that term are comprehended all such buildings as are within the curtilage, and as are considered as parcel of the dwelling-house at common law. In trespass the defendant justified an entry into a close and breaking into a barn under a *feri facias*; the plaintiff replied that the door of the barn was shut, and it was adjudged upon demurrer that in such a case the sheriff can break open the door of the barn without a request, in order to take the goods; for it shall be intended to be a barn in a field, and not a barn which is parcel of a house. For the Court agreed that if the barn had been adjoining to and parcel of the house, it could not be broken open. (*x*)

This personal privilege of an individual, in respect to his outer door or window, is confined also to cases where the breach of the house is made in order to arrest *the occupier or any of his family*, who have their domicile, their ordinary residence, there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary. (*y*) But it should be observed, that in all cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant. (*z*) And an officer cannot even enter the house of a

(*u*) Baker's case, 1 Leach, 112. 1 East, P. C. c. 5, s. 87, p. 323. It should be observed that in this case there was proof of a previous resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the county Court. The point reserved related to the legality of the attachment. *Ante*, p. 97.

(*x*) *Penton v. Brown*, 1 Sid. 186. See the authorities as to what is comprehended under the term dwelling-house at common law, under the titles of *Burglary* and *Arson*.<sup>1</sup>

(*y*) *Fost*. 320. 5 Co. 93. Mr. Smith, in his learned note to *Semayne's case*, 1 Sm. Lead. C. 45, after citing the observations of Lord Loughborough in *Sheere v. Brookes*, 2 H. Bl. 120, says, 'it seems to follow from this that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal.'

(*z*) 2 Hale, 103. *Fost*. 321. 1 East, P. C. c. 5, s. 87, p. 324. Mr. Smith, in the same note, says, 'there may, perhaps, be another

case in which the sheriff might justify entering the house of a stranger, upon bare suspicion, viz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house for the purpose of favouring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff who entered under the false supposition thus induced as a trespasser; or, perhaps, such conduct might be held to amount to a licence to the sheriff to enter.' It certainly is reasonable in such a case that the party should not be permitted to shew that in fact the defendant was not concealed in this house, and this would be in accordance with the principles established by *Pickard v. Sears*, 6 A. & E. 469. *Heane v. Rogers*, 9 B. & C. 586. *Kieran v. Sanders*, 6 A. & E. 515, and *Gregg v. Wells*, 10 A. & E. 90, in which last case it was held that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact, which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. C. S. G.

#### AMERICAN NOTE.

<sup>1</sup> In Missouri, a man's business office has been held to constitute his dwelling. *Morgan v. Durfee*, 69 Mo. 469; 33 Am. R. 508.

stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril as to the goods being found there or not; and if they be not found there, he is a trespasser. (a) A sheriff's officer is not justified in entering and searching the house of a stranger, though the door be open, for the purpose of arresting a defendant under a *capias ad satisfaciendum*, although the defendant may have resided there immediately before the entry, and although the officers have reasonable cause to suspect that the defendant is in the house; if it turned out that he was not in the house at the time; for a party who enters the house of a stranger to search for and arrest a defendant, can be justified only by finding him there. But if a sheriff enters the house of the defendant for the purpose of arresting him or taking his goods, he is justified if he has reasonable grounds for believing that the party or his goods are there. (b) And it has been decided that a sheriff cannot justify breaking the inner doors of the house of a stranger, *upon suspicion* that a defendant is there, in order to search for such defendant, and arrest him on mesne process. (c)

And the privilege is also confined to *arrests in the first instance*. For if a man, being legally arrested, (d) escape from the officer, and take shelter, though in his own house, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused. (e) If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate: and it should be observed, that the officer will not be authorised to break open doors in order to retake a prisoner in any case where the first arrest has been illegal. (f) Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistance, who attempted to force the door, when the party within shot one of the assistants: it was ruled to be only manslaughter. (g)

In all cases where the officer or his assistants, having entered a house in the execution of their duty, are locked in, they may justify breaking open the doors to regain their liberty. (h) So where a sheriff being lawfully in a house makes a lawful seizure of the goods of the owner of the house, and cannot take the goods out of the house without opening the outer door, and neither the owner nor any one else is there so that he can request them to open the door, he may break the door open to take out the goods. (i)

It has been deemed a question worthy of great consideration how far *third persons, especially mere strangers*, interposing in behalf of a party illegally arrested, are entitled to insist upon the illegality

(a) *Cooke v. Birt*, 5 Taunt. 765. *Morriah v. Murray*, 13 M. & W. 52.

(b) *Morriah v. Murray*, 13 M. & W. 52.

(c) *Johnson v. Leigh*, 6 Taunt. 246, *ante*, p. 112.

(d) Laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest. *Fost.* 320. But bare words will not make an arrest; the officer must actually

touch the prisoner. *Genner v. Sparkes*, 1 Salk. 79. *Berry v. Adamson*, 6 B. & C. 528.

(e) *Fost.* 320. *Genner v. Sparkes*, 1 Salk.

79. 1 Hale, 459. 2 Hawk. P. C. c. 14, s. 9.

(f) 1 East, P. C. c. 5, s. 87, p. 324.

(g) *Stevenson's case*, 10 St. Tr. 462.

(h) 2 Hawk. P. C. c. 14, s. 11. 1 East, P. C. c. 5, s. 87, p. 324.

(i) *Pugh v. Griffith*, 7 A. & E. 827.



of the arrest, in their defence, as extenuating their guilt in killing the officer.

The point was raised in the following case:—One Bray, who was a constable of St. Margaret's parish in Westminster, came into the parish of St. Paul, Covent Garden, where he was no constable, and consequently had no authority; (*j*) and there took up one Anne Dekins, under suspicion of being a disorderly person, but who had not misbehaved herself, and against whom Bray had no warrant. The prisoners came up; and though they were all strangers to the woman drew their swords, and assaulted Bray, for the purpose of rescuing the woman from his custody; upon which he shewed them his constable's staff, declared that he was about the Queen's business, and intended them no harm. The prisoners then put up their swords; and Bray carried the woman to the round-house in Covent Garden. A short time afterwards, the woman being still in the round-house, the prisoners drew their swords again, and assaulted Bray, on account of her imprisonment, and to get her discharged. Bray called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners; upon which a person named Dent came to his assistance; and before any stroke received, one of the prisoners gave Dent, while assisting the constable, a mortal wound. This case was elaborately argued; and the judges were divided in opinion; seven of them holding that the offence was manslaughter only, and five that it was murder. (*k*) The seven judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman and to rescue her who was unlawfully restrained of her liberty; and that it could not be murder, if the woman was unlawfully imprisoned; (*l*) and they also thought that the prisoners, in this case, had sufficient provocation: on the ground that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, and much more where it is done under a colour of justice; (*m*) and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise if she had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob.

The case of Hugget, and also that of Sir Henry Ferrers, appear to have been relied upon in support of the argument of the seven judges, who in the preceding case held the offence to be manslaughter. Hugget's case, in the fuller report of it, (*n*) appears to have been

(*j*) One judge only thought that Bray acted with authority, as he shewed his staff, and that, with respect to the prisoners, he was to be considered as constable *de facto*.

(*k*) *R. v. Tooley*, 2 Lord Raym. 1296. 'That case has been overruled,' per Alderson, B. *R. v. Warner, R. & M. C. C. R.* 385; and per Pollock, C. B. *R. v. Davis*, 1 L. & C. 64.

(*l*) For this Young's case, 4 Co. 40, was cited; and Meckally's case, 9 Co. 65.

(*m*) In *R. v. Osmer*, 5 East, 304, Lord Ellenborough, C. J., said, 'If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.'

(*n*) Hugget's case, Kel. 59.

thus : — Berry and two others pressed a man without a warrant for so doing ; to which the man quietly submitted, and went along with them. The prisoner with three others, seeing them, instantly pursued them, and required to see their warrant ; on which Berry shewed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at Berry ; whereupon Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. But this case is stated very differently by Lord Hale, as having been under the following circumstances : — A press-master seized B. for a soldier ; and, with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C. ; and by the advice of all the judges, except very few, it was ruled that this was but manslaughter. (*o*) The case of Sir Henry Ferrers was only this : — That Sir Henry Ferrers being arrested for debt, upon an illegal warrant, his servant, in seeking to rescue him, as was pretended, killed the officer ; but, upon the evidence, it appeared clearly, that Sir Henry Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant : wherefore he was found not guilty of the murder and manslaughter. (*p*)

But Foster, J., was of opinion, that these cases of Hugget and Sir Henry Ferrers' servant did not warrant the doctrine laid down by the seven judges in the case of Tooley ; and this great master of the crown law (*q*) has animadverted upon that doctrine with much force, viewing it as having carried the law, in favour of private persons officiously interposing in cases of illegal arrest, further than sound reason, founded on the principles of true policy, will warrant. (*r*) After observing that, in Hugget's case, swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began ; (*s*) whereas, though in Tooley's case, the prisoners had, at the meeting, drawn their swords against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seeming to have taken place ; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party ; and also in that case there was no possibility of rescue, the woman having been secured in the round-house ; he says, that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge, for what had before passed, than upon any hope or endeavour to assist the woman. He then proceeds, 'Now, what was the case of Tooley and his accomplices, stript of a pomp of words, and the colourings of artificial reasoning ? They saw a woman, for aught appears, a perfect stranger to them, led to the round-house under a charge of a criminal nature. This, upon evidence at the Old Bailey, a month or two afterwards, comes out to be an illegal arrest and imprisonment, a violation of Magna Charta ; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for Magna

(*o*) 1 Hale, 465.

(*p*) Sir Henry Ferrers' case, Cro. Car.

371.

(*q*) So called by Blackstone, 4 Com. 2.

(*r*) Fost. 312, *et seq.*

(*s*) In Hugget's case, the judges, who held it to be manslaughter, put the point upon an endeavour to rescue.

Charta (t) and the laws; and in this frenzy to have drawn upon the constable, and stabbed his assistant. It is extremely difficult to conceive that the violation of Magna Charta, a fact of which they were totally ignorant at the time, could be the provocation which led them into this outrage. But, admitting for argument sake that it was, we all know that words of reproach, how grating and offensive soever, are in the eye of the law no provocation in the case of voluntary homicide; and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knows that affronts of that kind pierce deeper, and stimulate the veins more effectually, than a slight injury done to a third person, though under colour of justice, possibly can. The indignation that kindles in the breast in one case is instinct, it is human infirmity; in the other it may possibly be called a concern for the common rights of the subject; but this concern, when well founded, is rather founded in reason and cool reflection, than in human infirmity; and it is to human infirmity alone that the law indulges in the case of a sudden provocation.' He then proceeds further: 'But if a passion for the common rights of the subject, in the case of individuals, must, against all experience, be presumed to inflame beyond a personal affront, let us suppose the case of an upright and deserving man, universally beloved and esteemed, standing at the place of execution, under a sentence of death manifestly unjust. This is a case that may well rouse the indignation, and excite the compassion, of the wisest and best men; but wise and good men know that it is the duty of private subjects to leave the innocent man to his lot, how hard soever it may be, without attempting a rescue; for otherwise all government would be unhinged. And yet, what proportion doth the case of a false imprisonment, for a short time, and for which the injured party may have an adequate remedy, bear to that I have now put?' (u)

In a more recent case, the prisoner, who cohabited with a person named Farmello, killed an assistant of a constable, who came to apprehend Farmello, as an idle and disorderly person, under the 19 Geo. 2, c. 10. Farmello, though he was not an object of the Act, did not himself make any resistance to the arrest; but the prisoner, immediately upon the constable and his assistant requiring Farmello to go along with them, without making use of any argument to induce them to desist, or saying one word to prevent the intended arrest, stabbed the assistant. And Hotham B., with whom Gould, J., and Ashhurst, J., concurred, held the offence to be murder. A special verdict, however, was found: (v) and the case was argued in the Exchequer Chamber, before ten of the judges; but no opinion was ever publicly delivered. (w)

(t) Holt, C. J., in delivering the judgment in Tooley's case, said, 'Sure a man ought to be concerned for Magna Charta and the laws; and if any one against the law imprison a man, he is an offender against Magna Charta.'

(u) Fost. 315, 316, 317.

(v) The Court advised the jury to find a special verdict, on the ground of the difference of opinion which had been entertained in Tooley's case, and the case of Hugget, *ante*, p. 115.

(w) Adey's case, 1 Leach, 206. And see *id.* p. 212, where it is said that the prisoner lay eighteen months in gaol, and was then discharged; but the following note is added, 'It is said, that the judges held it to be manslaughter only, but no opinion was ever publicly given; and *qu.*, whether the prisoner did not escape pending the opinion of the judges, when the gaol was burnt down in 1780, and was never retaken.' And see also 1 East, P. C. c. 5, s. 89, p. 329, note (a), where it is said, 'Upon inquiry, however, it

With respect to the persons who shall be considered as *taking a part* in the resistance, it may be observed, that if the party who is arrested, yield himself and make no resistance, but others endeavour to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them, but not in the party arrested: but not so if he do any act to countenance the violence of the rescuers. (x) And where *Jackson* and four others, having committed a robbery, were pursued by the country upon hue and cry, and *Jackson* turned upon his pursuers (others of the robbers being in the same field, and having often resisted the pursuers), and refusing to yield, killed one of the pursuers; it was held, that inasmuch as all the robbers were of a company, and made a *common resistance*, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from *Jackson*, were principals, viz., present, aiding and abetting: and it was also held, that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated *Jackson* to kill the party. (y)

If a man be arrested, and he and his company, endeavour a rescue, and, while they are fighting, one who knows nothing of the arrest, coming by, act in aid of the party arrested, and one of the bailiffs be killed, the person so acting in aid is guilty of murder; for a man must take the consequences of joining in any unlawful act, such as fighting; and his ignorance will not excuse him where the fact is made murder by the law without any actual precedent malice, as in the case of killing an officer in the due execution of his office. (z) But it should be observed, that, in another report of the same case, it is said to have been resolved, that if a person, not knowing the cause of the struggle, had interposed between the bailiff and the party arrested, *with intent to prevent mischief*, it would not have been murder in such person, though the bailiff's assistant were killed by one

appears that, pending the consideration of the case, by the judges, she escaped during the riots in 1780, and was never retaken. In *R. v. Porter* and others, which is reported as to another point, 9 C. & P. 778, upon an indictment for murder, where it appeared that the deceased, who was a watchman, and another were taking a person towards a station-house on a charge of robbing a garden, and were proceeding quietly along a road, the prisoner making no resistance, when they were attacked and the deceased beaten to death; in opening the case it was asserted, that even if the prisoner were not lawfully in custody, the offence was murder; for if a person were illegally in custody, and was making no resistance, no person had any right to attack the persons who had him in custody, and that if they did, and death ensued in consequence of the violence used to release the prisoner, it was murder; and that although there might be old cases to the contrary, they were no longer considered as

binding authorities; the point, however, did not ultimately become material, as it was held that the party was in lawful custody, but the above position was neither controverted by the very learned judge who tried the case, nor by the prisoner's counsel; and it should seem that it could not be successfully disputed, for it is difficult to discover upon what principle any individual can be justified in interfering to prevent what apparently is the due execution of the law, and that the question, whether he is guilty of murder or manslaughter, if death ensue, is to depend upon whether the custody is legal or illegal, of which, probably, at the time, he was perfectly ignorant, and which, consequently, could in no respect influence his conduct. See *ante*, p. 76. C. S. G.

(x) *Sir Charles Stanley's case*, Kel. 87. See *R. v. Whithorne*, 3 C. & P. 394, *post*, p. 127.

(y) *Jackson's case*, 1 Hale, 464, 465.

(z) *Sir C. Stanley's case*, Kel. 87.

of the rescuers; (a) and it should seem that, in a case of this kind, the material inquiry would be, whether the stranger interfered with the intention of preserving the peace and preventing mischief; for if he interposed for the express purpose of aiding one party against the other, he must abide the consequences at his peril. (b)

A. beat B., a constable, who was in the execution of his office, and they were parted; and then C. a friend of A., rushed suddenly in, took up the quarrel, fell upon the constable, and killed him in the struggle; but A. was not engaged in this after he was parted from B. And it was holden by two judges, that this was murder only in C.; and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to abuse the constable. (c) But if a man begin a riot, and the same riot continue, and an officer be killed, he that began the riot would, if he remained present at it, be a principal murderer, though he did not commit the fact. (d)

A great number of persons assembled in a house called *Sissinghurst*, in Kent, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz., A., was known, the rest were not known; and a warrant was obtained from a justice of peace to apprehend the said A., and divers others persons unknown, who were all together in *Sissinghurst-house*. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's warrant, and demanded A. with the rest of the offenders that were then in the house; and one of the persons within came, and read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors; but, going in, commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away; and being about five rods from the door, B., C., D., E., F., &c., about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on, and killed one of the assistants of the constable, and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A. and one G., that read the warrant were two. For this A., B., C., D., E., F., G., and divers others, were indicted of murder, and tried at the King's Bench bar, when these points were unanimously determined:—

1. That although the indictment were, that B. gave the stroke, and the rest were present aiding and assisting, though in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment; for in law it was the stroke of all that party, according to the resolution in *Macallay's case*. (e)

(a) *R. v. Sir C. Stanalie*, 1 Sid. 160. MS. Tracey, 53. 1 East, P. C. c. 5, s. 63, p. 296; Burnet *accord.* as cited, 1 East, P. C. c. 5, and see also Post. 353.

a. 63, p. 296.

(d) *R. v. Wallis*, 1 Salk. 334.

(b) 1 East, P. C. c. 5, s. 83, p. 318.

(e) 9 Co. 67 b. *R. v. Caton*, per Lush, J.

(c) By Holt, C. J., and Rooksby, at Hertford, temp. Will. 3, *ad incipium* MS.

12 Cox, C. C. 624, *post*, p. 129.

2. That in this case all that were present and assisting to the rioters were guilty of the death of the party slain, though they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled the riot, were in law present aiding and assisting, and principals, as well as those that issued out and actually committed the assault; for it was but within five rods of the house, and in view thereof, and all done as it were in the same instant. (f)

4. That here was sufficient notice that it was the constable, before the man was killed. 1. Because he was the constable of the same vill. 2. Because he notified his business at the door before the assault, viz., that he came with the justice's warrant. 3. Because, after his retreat, and before the man was slain, the constable commanded the peace; and, notwithstanding, the rioters fell on and killed the party.

5. It was resolved that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those who come in to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A., yet the killing of the assistant of the constable in that retreat was murder. 1. Because the retreat was one continued act in pursuance of his office; being necessary, when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

8. It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, the rioters pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peaceably retiring; but this point was not relied upon, because there was enough upon the former point to convict the offenders. In the conclusion, the jury found nine of them guilty and acquitted those within; not because they were absent, but because there was no clear evidence that they consented to the assault as the jury thought; and therefore judgment was given against the nine to be hanged. (g)

(f) Vide Lord Dacre's case, 1 Hale, 439. Crompt. 25, a. Dalt. c. 145, p. 472. 34 Hen. 8, B. Coron. 172. See also Moor, 86. Kel. 56.

(g) Sissinghurst-house case, 1 Hale, 461, 2, 3. The award was for the marshal to do execution, because they were remanded to the

custody of the marshal, and he is the immediate officer of the Court, and precedents in cases of judgments given in the King's Bench have commonly been, *Et dictum est marescallo, &c. quod faciat executionem periculo incumbente.*

## SEC. IX.

*Cases where the Killing takes place in the Prosecution of some Criminal, Unlawful, or Wanton Act.*

If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder. (*h*)

Under this head may be mentioned the cases of particular malice to one individual falling by mistake or accident upon another, which, by the ignorance or lenity of juries, have been sometimes brought within the rule of accidental death. But though, in a loose way of speaking, it may be called accidental death when a person dies by a blow not intended against *him*, the case is considered by the law in a very different light. Thus, if it appears from circumstances that the injury intended to A., whether by poison, blow, or any other means of death, would have amounted to murder if he had been killed by it, it will amount to the same offence if B. happen to fall by the same means; (*i*) so that if C., having malice against A., strikes at and misses him, but kills B., this is murder in C.; (*j*) and upon the same principle, if A. and B. engage in a deliberate duel, and a stranger coming between them to part them is killed by one of them, it is murder in the party killing. (*k*) And it has also been resolved, that where A. had malice against D., the master of B., and assaulted him, and upon B. the servant coming to the aid of his master, A. killed B., it was murder in A. as much as if he had killed the master. (*l*) So, where A. gave a poisoned apple to his wife intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died; this was held murder in A., though he, being present at the time, endeavoured to dissuade his wife from giving the apple to the child. (*m*) And, upon the same principle, it was held to be murder where A. mixed poison in an electuary sent by an apothecary to her husband, with intent to poison him, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation, tasted it himself, having first

(*h*) *Post.* 261. This must be taken with some qualification; see the cases referred to *infra*.

(*i*) *Id.* *ibid.* 1 Hale, 441, Williams's case, 1 Hale, 469. See Mawgridge's case, *Kel.* 131.

(*j*) 1 East, P. C. c. 5, s. 17, p. 230.

(*k*) 1 Hale, 441. *Dalt.* c. 145, p. 472. It appears to have been holden in such a case, where the combating was by malice prepense, that the killing of the person who came to part them was murder in both the combatants, 22 *Edw.* 3, *Coron.* 262. *Lambard* out of *Dallison's* Report, p. 217. But Lord Hale thinks that this is mistaken, and that it is

not murder in both, unless both struck him who came to part them; and says that by the book of 22 *Ass.* 71, *Coron.* 180 (which seems to be the case more at large) he only that gave the stroke had judgment, and was executed. 1 Hale, 441, to which this note is subjoined; 'the other does not appear to have been before the Court; but, upon putting the case, the Court said he that struck is guilty of felony, but said nothing as to him who did not strike.'

(*l*) 1 Hale, 438.

(*m*) *Saunders's* case, *Plowd.* 474. 1 *Hawk.* P. C. c. 31, s. 46. 1 Hale, 436.

stirred it about. (n) Doubt was entertained, because the apothecary, of his own hand, without incitement from any one, not only partook of the electuary, but mingled it together, so as to incorporate the poison, and make its operation more forcible than the mixture as made by the wife of A.: but the judges resolved that she was guilty of murder; for the putting the poison into the electuary was the cause of the death: and if a person prepares poison with intent to kill any reasonable creature, such person is guilty of the murder of whatever reasonable creature is killed thereby. (o) So if A. put poison into wine, with intent to kill B., and C. drinks thereof and dies, A. is guilty of the murder of C.; and it makes no difference that the wine, unless stirred up, would not have killed C., and that C., thinking there was sugar in it, stirred it up. (p)

So, where a person gave medicine to a woman to procure an abortion, (q) and where a person put skewers into the womb of a woman for the same purpose; (r) by which in both cases the women were killed, these acts were held clearly to be murder; for though the death of the woman was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practised.<sup>1</sup>

There are also other cases where no mischief is intended to any particular individual, but where there is a general malice or depraved inclination to mischief, fall where it may; and in these cases the act itself being unlawful, attended with probable serious danger, and done with a mischievous intent to hurt people, the killing will amount to murder. (s) Thus, if a man go deliberately, and with an intent to do mischief, upon a horse used to kick, or coolly discharge a gun amongst a multitude of people, and death be the consequence of such acts, it will be murder. (t) So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. (u) And upon the same principle, if a man, knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against any particular individual: for it is no excuse that the party was bent upon mischief generally. (v)

(n) Gore's case, 9 Co. 81. 1 Hawk. P. C. c. 31, s. 45. 1 Hale, 436.

(o) *Ante*, note (n).

(p) 9 Co. 81 b. See *R. v. Michael*, 2 Moo. C. C. R. 120.

(q) 1 Hale, 429.

(r) *Tinckler's case*, 1 East, P. C. c. 5, s. 17, p. 230, and s. 124, p. 354.

(s) 1 Hale, 475. 1 East, P. C. c. 5, s. 18, p. 231.

(t) 1 Hale, 476. 4 Blac. Com. 200. 1 Hawk. P. C. c. 29, s. 12. 1 East, P. C. c. 5, s. 18, p. 231. *Hawkins*, speaking of the instance of the person riding a horse used to

kick amongst a crowd, says, it would be murder, though the rider intended no more than to divert himself by putting the people into a fright. 1 Hawk. P. C. c. 31, s. 68, and see *ante*, p. 23.

(u) 4 Blac. Com. 200.

(v) 1 Hale, 475. 3 Inst. 57. 1 East, P. C. c. 5, s. 18, p. 231. See remarks by Blackburn, J., in the course of the argument in *R. v. Pembliton*, 43 L. J. M. C. 91, 93, and *R. v. Latimer*, 17 Q. B. D. 359. See also *R. v. Marten*, 8 Q. B. D. 54, and *R. v. Faulkner*, 13 Cox, C. C. 550.

#### AMERICAN NOTE.

<sup>1</sup> Administering poison with intent to stupefy in order to get possession of property (*S. v. Wagner*, 78 Mo. 644; 47 Am. R. 131)

or to escape from lawful custody (*S. v. Wells*, 61 Iowa, 629; 47 Am. R. 822) and from which death ensues is murder.



Whenever an unlawful act, an act *malum in se*, is done in prosecution of a *felonious* intention, and death ensues, it will be murder: as if A. shoot at the poultry of B. intending to steal the poultry, and by accident kill a man, this will be murder by reason of the felonious intention of stealing. (*w*) So, if a man set fire to a house, whereby a person in it is burnt to death. (*x*) And it was held, that if such offenders as were mentioned in the statute *De malefactoribus in parcis*, (*y*) killed the keeper, &c., it was murder in all, although it appeared that the keeper ordered them to stand, assaulted them first, and that they fled, and did not turn till one of the keeper's men had fired and hurt one of their companions. (*z*)

It has been shewn, that where death ensues from an act done in the prosecution of a felonious intention, it will be murder; (*a*) but a distinction is taken in the case of an act done with the intent only of committing a bare trespass; as if death ensues from such act, the offence will be only manslaughter. (*b*) Thus, though if A. shoot at the poultry of B., intending to steal them, and by accident kill a man, it will be murder; yet, if he shoot at them wantonly, and without any such felonious intention, and accidentally kill a man, the offence will be only manslaughter. (*c*) And any one, who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstances of the nature of the instrument used, and the manner of using it, as calculated to produce great bodily harm or not. (*d*) And if a man be doing an unlawful act, though not intending bodily harm to any one, as if he be throwing a stone at another's horse, and hit a person and kill him, it is manslaughter. (*e*) But it seems, that in cases of this kind the guilt would rather depend upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent. (*f*)

(*w*) *Fost.* 258, 259. *Lord Coke*, 3 *Inst.* 56, says, 'if the act be unlawful it is murder; as if A., meaning to steal a deer in the park of B., shoots at the deer, and by the glance of the arrow kills a boy that is hidden in a bush, this is murder; for that the act was unlawful,' and he cites *Bract. Lib.* 3. 120b. And then he draws the distinction between shooting wild fowl and shooting at any tame fowl, and says, if the arrow by misadventure kills a man, it is murder; and cites for the latter position 3 *Edw.* 3, *Coron.* 354, 2 *Hen.* 4, 18, and 11 *Hen.* 7, 23. *Lord Hale*, 1 *Hale*, 38, cites 11 *Hen.* 7, 23, *Br. Coron.* 229, *Proclamation*, 12. 22 *Ass. pl.* 71, and see 1 *Hale*, 568. In *R. v. Plummer*, *Kel.* 117, the question is discussed in the judgment of the C. J., and *Lord Coke's* dictum is explained to mean that if two men have a design to steal a hen, and one shoots at the hen for that purpose, and a man be killed, it is murder in both, because the design was felonious; and it is said that with that explanation the books cited do warrant that opinion. *Forster*, 258-9, cites 3 *Inst.* 56, and *Kel.* 117. The law appears to be that

any one who deliberately attempts to commit a felony and thereby occasions death, is guilty of murder. But in this respect the law seems unreasonable.

(*x*) *R. v. Smithies*, 5 C. & P. 332.

(*y*) 21 *Edw.* 1, st. 2, now repealed by 7 & 8 *Geo.* 4, c. 27. 1 *Hale*, 491.

(*z*) 1 *East*, P. C. c. 5, s. 31, p. 256, citing 1 *MS. Sum.* 145, 175. *Sum.* 37, 46. *Palm.* 546. 2 *Roll. Rep.* 120. The reason is, the Act provides that, if after hue and cry made to stand, they will not yield, but flee or defend themselves, and the keepers kill them in taking them, they shall not be troubled in any way for it. Therefore all that the keepers did in this case was lawful, and consequently the killing was the killing of a party in the due execution of his duty.

(*a*) *Ante*, p. 121.

(*b*) *Fost.* 258. Though *Lord Coke* seems to think otherwise, 3 *Inst.* 56.

(*c*) *Fost.* 258, 259. 1 *Hale*, 475.

(*d*) 1 *East*, P. C. c. 5, s. 32, pp. 256, 257. 1 *Hale*, 39.

(*e*) 1 *Hale*, 39.

(*f*) 1 *East*, P. C. c. 5, s. 32, p. 257.

On an indictment for murder, it appeared that the prisoner had set fire to a stack of straw in an enclosure in which was an outhouse or barn, but not adjoining to any house. While the fire was burning, the deceased was seen in the flames, and his body was afterwards found in the enclosure. It did not clearly appear whether he had been in the outhouse or merely lying on or by the side of the stack. There was no evidence who he was, or how or when he came there, nor that the prisoner had any idea that any one was, or was likely to be, there, and when he saw the deceased, he wanted to save him. It did not exactly appear how long the fire had been kindled before it was discovered, but very soon after it was discovered the deceased was seen in the flames. Bramwell, B., told the jury that 'the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, even though he did not intend it. And though that may appear unreasonable, yet, as it is laid down as law, it is our duty to act upon it. The law, however, is that a man is not answerable except for the natural and probable result of his own act; and therefore, if you should not be satisfied that the deceased was in the farm or enclosure at the time the prisoner set fire to the stack, but came in afterwards, then, as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act. And in that view he ought to be acquitted on the present charge.' (g)

Also, where the intent is to do some great *bodily harm* to another, and death ensues, it will be murder; as if A. intend only to *beat* B. in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for all its consequences. He beat B. with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did. (h) So if a large stone be thrown at one with a deliberate intention to hurt, though not to kill him, and by accident it kill him, or any other, this is murder. (i) If a wrongful act (an act which the party who commits it can neither justify nor excuse) be done under circumstances which shew an intent to kill, or to do any serious injury, or any general malice, the offence is murder. (j) But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in all such cases. (k)

Upon an indictment for murder it appeared that the deceased, being in liquor, had gone at night into a glass-house, and laid himself down upon a chest; and that while he was there asleep the prisoners covered and surrounded him with straw, and threw a shovel

(g) *R. v. Horsey*, 3 F. & F. 287. Mr. Greaves doubts the correctness of this decision. See *R. v. Child*, 40 L. J. M. C. 127, per Blackburn, J. The more modern view of the law has thus been expressed by Stephen, J., 'Any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony,

which caused death should be murder.' *R. v. Serné*, 16 Cox, C. C. 311.

(h) *Fost.* 259.

(i) 1 Hale, 440, 441.

(j) Per Tindal, C. J., *Fenton's case*, 1 Lewin, 179. See the case, *post*.

(k) *Kel.* 127. 1 East, P. C. c. 5, s. 32, p. 257.

of hot cinders upon his belly; the consequence of which was that the straw ignited, and he was burnt to death: there was no evidence of express malice, but the conduct of the prisoners indicated an entire recklessness of consequences, hardly consistent with anything short of design. Patteson, J., adverted to the fact of there being no evidence of express malice, but told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter. (*l*)

**Where several join to do an unlawful act.**<sup>1</sup> — Where divers persons resolve generally to *resist all opposers* in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, when they engage in such bold disturbances of the public peace, at their peril, abide the event of their actions. And therefore if in doing any of these acts they happen to kill a man, they are all guilty of murder. (*m*) But it should be observed, that in order to make the killing by any, murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavour, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened. (*n*)

And it should also be observed, that the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled; and therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an opportunity, kill him, the rest are not concerned in the guilt of that act, because it had no connection with the crime in contemplation. (*o*) So, where two men were beating another man in the street, and a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife; and both the men were indicted as principals in the murder; although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon that act, and as it appeared that only one of them intended any in-

(*l*) Errington's case, 2 Lewin, 217.

(*m*) 1 Hawk. P. C. c. 31, s. 51, Staundf. 17. 1 Hale, 439, *et seq.* 4 Blac. Com. 200.

1 East, P. C. c. 55, s. 33, p. 257.

(*n*) 1 East, P. C. c. 5, s. 34, p. 259.

(*o*) 1 Hawk. P. C. c. 31, s. 52. Fost. 351. And see the charge of Foster, J., on a special commission for the trial of Jackson and others, at Chichester, 9 St. Tri. (ed. by Hargr.) 715, *et seq.*

#### AMERICAN NOTE.

<sup>1</sup> Where death is caused in the course of a forcible detainer or entry upon lands or house, or of a conspiracy to injure fellow-workmen, etc., the following American cases may be consulted, — *Weston v. C.*, 111 Pa. 251. *Williams v. S.*, 81 Ala. 1; 60 Am. R. 133. *S. v. McCahil*, 72 Iowa, 111. *Hamilton*

*v. P.*, 113 Ill. 34; 55 Am. R. 396. *Stephens v. S.*, 42 Ohio St. 150. *S. v. McIntyre*, 66 Iowa, 339. *Ritzman v. P.*, 110 Ill. 362. *Lamb v. P.*, 96 Ill. 73. *P. v. Leith*, 52 Cal. 251. *Jordan v. S.*, 79 Ala. 9. *Clay v. P.*, 86 Ill. 147. *P. v. Foley*, 59 Mich. 553.

jury to the person killed, the judges were of opinion that the other could not be guilty either as principal or accessory. (*p*)

Where a party of smugglers were met and opposed by an officer of the Crown, and during the scuffle which ensued a gun was discharged by a smuggler, which killed one of his own gang, the question was, whether the whole gang were guilty of this murder; and it was agreed by the Court, that if the King's officer, or any of his assistants, had been killed by the shot, it would have been murder in all the gang; and also, that if it had appeared that the shot was levelled at the officer, or any of his assistants, it would also have amounted to murder in the whole of the gang, though an accomplice of their own were the person killed. (*r*) The point upon which this case turned was, that it did not appear from any of the facts found, that the gun was discharged in prosecution of the purpose for which the party was assembled. (*s*) In another case the prisoners were hired by a tenant to assist him in carrying away his household furniture in order to avoid a distress. They accordingly assembled for this purpose armed with bludgeons and other offensive weapons; and a violent affray took place between them and the landlord of the house, who, accompanied on his part by another set of men, came to prevent the removal of the goods. The constable was called in and produced his authority, but could not induce them to disperse: and, while they were fighting in the street, one of the company, but which of them was not known, killed a boy who was standing at his father's door looking on, but totally unconcerned in the affray. The question was, whether this was murder in all the company; and Holt, C. J., and Pollexfen, C. J., were of opinion that it was murder in all the company, because they were all engaged in an unlawful act, by proceeding in the affray after the constable had interposed and commanded them to keep the peace; especially as the manner in which they originally assembled, namely, with offensive weapons and in a riotous manner, was contrary to law. (*t*) But the majority of the judges held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act. (*u*) And it seems that this opinion proceeded upon the ground that there was no evidence to shew that the stroke by which the boy was killed was either levelled at any of the opposing party, or was levelled at him upon the supposition that he was one of the opponents, and therefore that it was not given in prosecution of the purpose for which the party was assembled. (*v*)

The prisoners, eight in number, each having a gun, upon being found poaching by some keepers, who went towards them for the purpose of apprehending them, formed into two lines, and pointed

(*p*) Anonymous, 8 Mod. 164. 1 Hawk. P. C. c. 31, s. 52.

(*r*) Plummer's case, Kel. 109.

(*s*) Fost. 352, and see Mansell and Herbert's case, 1 Hale, 440, 441, cited from Dy. 128 b.

(*t*) They cited Stamf. 17, 40. Fitz. Cor. 350. Crompt. 244.

(*u*) R. v. Hodgson and others, 1 Leach,

6. See Plummer's case, *ante*, note (*r*). 12 Mod. 629. Thompson's case, Kel. 66. Anon. cited by Holt, C. J. 1 Leach, 7, note (*a*), and a case Anon. 8 Mod. 165. See also Keilw. 161, and Borthwick's case, Dougl. 202.

(*v*) 1 East, P. C. c. 5, s. 33, p. 258, 259; and see the remarks of Lord Hale, upon the case of Mansell and Herbert (Dy. 128 b.) in 1 Hale, 440, 441.

their guns at the keepers, saying they would shoot them; a shot was then fired which wounded a keeper, but no other shot was fired: it was objected that it was clear that there was no common intent to shoot this man, because only one gun was fired, instead of the whole number. Vaughan, B., 'That is rather a question for the jury, but still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the game-keepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shewn that either of them separated himself from the rest, and shewed distinctly that he would have no hand in what they were doing, the objection would have much weight in it.' (w) Two private watchmen seeing the prisoner and another man with two carts laden with apples, which they suspected had been stolen, went up to them, and one walked beside the prisoner, and one beside the other man, at some distance from each other, and while they were so going along, the prisoner's companion stepped back, and with a bludgeon wounded the watchman he had been walking with; Garrow, B., 'To make the prisoner a principal the jury must be satisfied that when he and his companion went out with a common illegal purpose of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them: but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal.' (x)

Where the whole of a party of poachers set upon and beat a keeper till he was senseless, and having left him lying on the ground, one of them after they had gone a little distance returned, and stole his money, it was holden that he alone was guilty of the stealing. (y) Where two poachers were apprehended by some game-keepers, and being in custody called out to one of their companions, who came to their assistance and killed one of the gamekeepers, it was held that this was murder in all, though the blow was struck while the two were actually in custody, but that it would not have been so, if the two had acquiesced and remained passive in custody. (z)

Where four poachers were met by a keeper and his assistant, and after some words had passed, three of them ran in upon the keeper, knocked him down and stunned him; and when he recovered himself, he saw all of them coming by him, and one said, 'Damn 'em we've done 'em;' and when they had got two or three paces beyond him, one of them turned back and wounded the keeper in the leg,

(w) *R. v. Edmeads*, 3 C. & P. 390.

(y) *R. v. Hawkins*, 3 C. & P. 392, J. A.

(z) *R. v. Collison*, 4 C. & P. 565. See the observations of Littledale, J., in *R. v. Howell*, 9 C. & P. 450. *R. v. Lee*, 4 F. & F. 63.

Park, J.<sup>1</sup>

(z) *R. v. Whithorne*, 3 C. & P. 394, MSS. C. S. G. Vaughan, B. See *ante*, p. 118, notes (x) and (y).

and then the men set off and ran away ; Bolland, B., told the jury if they thought the prisoners were acting in concert, they were all equally guilty of inflicting the wound. (a)

Where, upon an indictment for maliciously cutting, the question was, how far one prisoner was concurring in the act of the other ; Park, J., told the jury that, 'If three persons go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out.' (b)

On an indictment for murder it appeared that the six prisoners, who were shipmates, for some cause of offence unknown, chased a German sailor belonging to another ship through the streets, and as he took refuge from their attack against a railing, he was stabbed by one of them with a knife, of which wound he died in a few minutes. The evidence as to the hand by which the blow was given was very conflicting. Byles, J., told the jury that supposing they could fix upon the hand that stabbed, the first question would be what was his offence ? The person who stabbed was clearly guilty of murder, whether he intended to kill or not. If he only intended to commit bodily harm, he was guilty of murder. The next question was in what condition were the other five men ? The deceased sailor was leaning against some iron railings when the stab was given, but before that he had been assaulted in a barbarous and dastardly manner by these six men ; but did the other men contemplate the use of the knife, or was it an independent act of the man who used it ? They were all guilty of murder if they participated in a common design and intention to kill. If they should think that the others did not intend and design to kill, yet these others would also be guilty of murder if the knife was used in pursuance of one common design to use it, because then the hand that used the knife was the hand of all of them. Supposing there was no common design to use the knife, if being present at the moment of stabbing, they assented and manifested their assent by assisting in the offence, they were guilty of murder. First, then, there must be a common design to kill ; secondly, there must be a common design to use a murderous instrument ; and, thirdly, there must be presence at the time and assent and assistance in the use of the knife. If, however, they should think neither of these three modes of putting the case proved against the five, it would be their duty to find the stabber guilty and to acquit the others. (c)

Where on an indictment for murder it appeared that the deceased was found tied hand and foot with string, and something forced into her throat, by which she had been suffocated, and the house in which she was had been forcibly entered, and the object evidently had been robbery ; the jury were told that if they were satisfied that the

(a) *R. v. Warner*, R. & M. C. C. R. 380. S. C. 5 C. & P. 525.

(b) *Duffey's case*, 1 Lew. 194. See *Macklin's case*, 2 Lew. 225, per Alderson, B., *post*.

(c) *R. v. Price*, 8 Cox, C. C. 96. This case is evidently so inaccurately reported that great caution must be used as to it. See *post*, 129.

deceased met with her death from violence by any person or persons to enable them to commit a burglary or any other felony, although they who inflicted the violence might not have intended to kill her, all who were parties to that violence were guilty of murder. (*d*)

The prisoner was indicted for manslaughter. A man named Allen commenced a quarrel with the deceased, and called the prisoner out of a public-house, and both went after the deceased into a cellar and began to beat the deceased with their fists. In the course of the fight the deceased received from one or other of the men a blow from a piece of timber which was in the cellar. Allen was tried and convicted of manslaughter, and Cleasby, B., is reported to have ruled that Allen, having invited the prisoner down into the cellar to beat the deceased, was answerable for whatever was done afterwards. Lush, J., is reported to have said that might be so, and yet that the prisoner would not be responsible for all that Allen did. If two men concerted together to fight two other men with their fists, and one struck an unlucky blow causing death, both would be guilty of manslaughter. But if one used a knife or other deadly weapon, such as this piece of timber, without the knowledge or consent of the other, he only who struck with the weapon would be responsible for the death resulting from the blow given by it. (*e*)

## SEC. X.

*Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Lawful Authority.*

Due caution should be observed by all persons in the discharge of the business and duties of their respective stations, lest they should proceed by means which are criminal or improper, and exceed the limits of their authority. This will more especially require the attention of officers of justice; and should be kept in mind by those who have to administer correction *in foro domestico*, and by persons employed in those common occupations from which danger to others may possibly arise.

**Officers of justice acting improperly.** — It has been shewn in a former part of this chapter (*f*) that *ministers of justice*, when in the execution of their offices, are specially protected by the law:

(*d*) *R. v. Franz*, 2 F. & F. 580. See *R. v. Luck*, 3 F. & F. 483. The marginal note is not warranted by the case, and the case is very inaccurately stated. Byles, J., is reported to have directed the grand jury that, 'as the poachers were not engaged in a felony, the use of the flail with violence might reduce the offence to manslaughter.' It is perfectly clear that there is no such distinction known to the law as to the manner of arrest between cases of felony and misdemeanor, where the right to arrest at the time and place, and by the person attempting it, exists; and an

attack with such a dangerous instrument as a flail, in order to arrest any one for a felony, would clearly reduce the offence to manslaughter; it is plain there was no reason for drawing any such distinction, and therefore the report is probably erroneous. C. S. G. See *R. v. Skeet*, 4 F. & F. 391.

(*e*) *R. v. Caton*, 12 Cox, C. C. 624. See *R. v. Turner*, 4 F. & F. 339, where Channell, B., ruled that it was otherwise on a charge of manslaughter. It seems Lush, J.'s, ruling is correct.

(*f*) *Ante*, p. 70, *et seq.*

but it behoves them to take care that they do not misconduct themselves in the discharge of their duty, on pain of forfeiting such protection. Thus, though in cases civil or criminal, an officer may repel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing if death should be the consequence; (*g*) yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. (*h*) And if he should kill where no resistance is made, it will be murder: and it is presumed that the offence would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled. (*i*) And again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken; (*j*) yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him, it will in general be murder; (*k*) but, under circumstances, it may amount only to manslaughter, if it appear that death was not intended. (*l*)

So, in civil suits, if the party against whom the process is issued, fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer not being able to overtake him make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it will amount to murder. (*m*)

But it is rather to be considered as murder or manslaughter, as circumstances may vary the case; for if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence. (*n*)

Where a collector, having distrained for a duty, laid hold of a maid servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the Court held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that he was guilty of manslaughter in so far exceeding the necessity of the case. (*o*)

(*g*) *Ante*, p. 72.

(*h*) 4 Blac. Com. 180.

(*i*) 1 East, P. C. c. 5, s. 63, p. 297. The crime will at least be manslaughter. MSS. Burnet, 37.

(*j*) 1 Hale, 481. 4 Blac. Com. 179. *Fost.* 271. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not. 1 East, P. C. c. 5, s. 67, p. 298.

(*k*) *Fost.* 271. 1 Hale, 481.

(*l*) *Fost.* 271. 1 East, P. C. c. 5, s. 70, p. 302.

(*m*) 1 Hale, 481. *Fost.* 271. 1 East, P. C. c. 5, s. 74, p. 306, 307. Laying hold of the prisoner and pronouncing words of arrest, is an actual arrest; or it may be made without actually laying hold of him, if he submit to the arrest. *Horne v. Battyn* and another, Bull. N. P. 62, and see 1 East, P. C. c. 5, s. 68, p. 300. But see *Arrowsmith v. Le Mesurier*, 2 N. R. 211, and *Berry v. Adamson*, 6 B. & C. 528.

(*n*) *Fost.* 271.

(*o*) *Goffe's case*, 1 Vent. 216.



An officer in the impress service put one of his seamen on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects of the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her, with a musket loaded with ball, for the purpose of hitting the halyards, and bringing the boat to, which was found to be the usual way, and one of the shots unfortunately killed Collyer. The Court said it was impossible for it to be more than manslaughter. (q) It is presumed, that this decision proceeded on the ground that the musket was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as such an act was calculated to breed danger, and not warranted by law, though no bodily hurt were intended, it was holden to be manslaughter, and the defendant was burned in the hand. (r) It may here be observed, however, that by the statute for the prevention of *smuggling*, it is enacted, that in case any vessel or boat, liable to seizure or examination, shall not bring to on being required to do so, or being chased by any vessel or boat in Her Majesty's navy, having the proper pendant and ensign of Her Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person, having the charge or command of such vessel in Her Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such vessel or boat; and such captain, master, or other person, acting in his aid or assistance, or by his direction, shall be indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing. (s)

If an officer make an arrest out of his proper district, (except as he may be authorised by some Act of Parliament,) or if an officer have no warrant or authority at all, he is no legal officer, nor entitled to the special protection of the law; and if he purposely kill the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent. (t)

So if a court-martial order a man to be flogged where they have no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder. (x)

It is no excuse for killing a man that he was out at night as a ghost dressed in white for the purpose of alarming the neighbourhood, even though he could not otherwise be taken. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and upon meeting with a person dressed in white, immediately shot him. M'Donald, C. B., Rooke and Lawrence, JJ., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him, though he could

(q) *R. v. Phillips*, Cowp. 830.

(r) 1 East, P. C. c. 5, s. 75, p. 308.

(s) 16 & 17 Vict. c. 107, s. 218, see 4 Taunt. 77.  
vol. i. p. 277, *et seq.*

(t) 1 East, P. C. c. 5, s. 78, p. 312.

(x) By Heath, J., in *Warden v. Bailey*,

not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the Court said that they could not receive that verdict; and told the jury that if they believed the evidence they must find the prisoner guilty of murder; and if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced: but the prisoner was afterwards reprieved. (y)

Upon a trial for murder, it appeared that the prisoner, an excise officer, being in the execution of his office, had seized, with the assistance of another person, two smugglers in the act of landing whiskey from the Scottish shore, contrary to law; the deceased had surrendered himself quietly into the hands of the prisoner, but shortly afterwards, when the prisoner was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood, and was greatly weakened in the struggle which succeeded; the officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge did not take effect, and the deceased prepared to make another assault; that, seeing this, the prisoner warned him to keep off, telling him he must shoot him if he did not; but the deceased disregarded the warning, and rushed towards him to make a fresh attack; that he thereupon fired a second pistol and killed him. Holroyd, J., told the jury, 'An officer must not kill for an escape, where the party is in custody for a misdemeanor; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is, whether, under all the circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to.' (z)

Gaolers and their officers are under the same special protection as other ministers of justice; but in regard to the great power which they have, and, while it is exercised in moderation, ought to have, over their prisoners, the law watches their conduct with a jealous eye. If, therefore, a prisoner under their care die, whether by disease or accident, the coroner, upon notice of such death, which notice the gaoler is obliged to give in due time, ought to resort to the gaol; and there, upon view of the body, make inquisition into the cause of the death; and if the death was owing to cruel and oppressive usage on the part of the gaoler or any officer of his, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful

(y) R. v. Smith, O. B. Jan. 1804, MS.  
Bayley, J. 4 Blac. Com. 201 n.

(z) Forster's case, 1 Lewin, 187.

murder in the person guilty of such duress. (a) The person *guilty* of such duress will be the party liable to prosecution, because, though in a civil suit, the principal may in some cases be answerable in damages to the party injured through the default of the deputy; yet, in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults. (b)

Gaolers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore, an assault upon a gaoler, which would warrant him (apart from personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent. (c) And if an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, he will at least be guilty of manslaughter. (d)

A gaoler, knowing that a prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner, who had not had the disease, of which fact the gaoler had notice, caught the disease, and died of it; this was holden to be murder. (e)

Huggins was warden of the Fleet prison, with power to execute the office by deputy, and appointed one Gibbon who acted as deputy. Gibbon had a servant, Barnes, whose business it was to take care of the prisoners, and particularly of one Arne; and Barnes put Arne into a new-built room, over the common sewer, the walls of which were damp and unwholesome, and kept him without fire, chamber-pot, or other necessary convenience, for forty-four days, when he died. It appeared that Barnes knew the unwholesome situation of the room, and that Huggins knew the condition of the room fifteen days at least before the death of Arne, as he had been once present at the prison, and seen Arne under such duress of imprisonment, and turned away; at which time Barnes shut the door of the room, in which Arne continued till he died. It was found that Arne had sickened and died by duress of imprisonment, and that during the time Gibbon was deputy, Huggins sometimes acted as warden. Upon these facts the Court were clearly of opinion that Barnes was guilty of murder. But they thought that Huggins was not guilty, as it could not be inferred, from merely seeing the deceased once during his confinement, that Huggins knew that his situation was occasioned by the improper treatment, or that he consented to the continuance of it: and they said, that it was material that the species of duress, by which the deceased came to his death, could not be known by a bare looking-in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without

(a) *Fost.* 321. 1 *Hale*, 465.

(b) *Fost.* 322. *R. v. Huggins and Barnes*, 2 *Str.* 882. See *R. v. Allen*, 7 *C. & P.* 153, and *R. v. Green*, 7 *C. & P.* 156, *post*.

(c) 1 *East*, *P. C. c.* 5, s. 91, p. 331, citing 1 *MS. Sum.* 145, *semib.* *Pult.* 120, 121. And see 1 *Hawk. P. C. c.* 28, s. 13, where it is

said, that if a criminal endeavouring to break the gaol, assault the gaoler, he may be lawfully killed by him in the affray.

(d) 1 *Hawk. P. C. c.* 29, s. 5.

(e) *Fost.* 322, referring to the case of *Castell v. Bambridge and Corbet* (an appeal of murder), 2 *Str.* 854.

the decent necessities of life: and it was likewise material that no application was made to Huggins, which perhaps might have altered the case. And the Court seemed also to think that as Barnes was the servant of Gibbon, and Gibbon had the actual management of the prison, the accidental presence of the principal would not amount to a revocation of the authority of the deputy. (*f*)

With respect to the duty of officers in the execution of criminals, it has been laid down as a rule, *that the execution ought not to vary from the judgment*; for if it doth, the officer will be guilty of felony at least, if not of murder. (*g*) And in conformity to this rule, it has been holden, that if the judgment be to be hanged, and the officer behead the party, it is murder; (*h*) and that even the King cannot change the punishment of the law by altering the hanging or burning into beheading, though, when beheading is part of the sentence, the King may remit the rest. (*i*) But others have thought, more justly, that this prerogative of the Crown, founded in mercy and immemorially exercised, is part of the common law; (*j*) and that though the King cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it: and accordingly that an officer, acting upon a warrant from the Crown for beheading a person under sentence of death for felony, would not be guilty of any offence. (*k*) But the rule may apply to an officer varying from the judgment of his own head, and without warrant or the colour of authority. (*l*)

**Persons on board ship.** — Persons on board ship are necessarily subjected to something like a despotic government, and it is extremely important that the law should regulate the conduct of those who exercise dominion over them. Therefore, in a case of manslaughter against the captain and mate of a vessel, by accelerating the death of a seaman really in ill health, but whom, they allege, they believe to be a skulker, that is, a person endeavouring to avoid his duty, the question is (in determining whether it is a slight or aggravated case), whether the phenomena of the disease were such as would excite the attention of humane and reasonable men; and, in such a case, if the deceased be taken on board after he was discharged from a hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman. (*m*)

**Correction in foro domestico.**<sup>1</sup> — Parents, masters, and other per-

(*f*) R. v. Huggins and Barnes, 2 Str. 882.  
2 Lord Raym. 1574. Fost. 322. 1 East,  
P. C. c. 5, s. 92, pp. 331, 332.

(*g*) 1 Hale, 501. 2 Hale, 411. 3 Inst.  
52, 211. 4 Blac. Com. 179. See R. v.  
Antrobus, 2 A. & E. 788.

(*h*) 1 Hale, 433, 454, 466, 501. 2 Hale,  
411. 3 Inst. 52. 4 Blac. Com. 179.

(*i*) 3 Inst. 52. 2 Hale, 412.

(*j*) Fost. 270. F. N. B. 244 h., 19 Rym.  
Fod. 284.

(*k*) Fost. 268. 4 Blac. Com. 405. 1 East,  
P. C. c. 5, s. 96, p. 335.

(*l*) It was, however, the practice, founded  
in humanity, when women were condemned  
to be burned for treason, to strangle them at  
the stake before the fire reached them, though  
the letter of the judgment was that they  
should be burnt in the fire *till they were dead*.  
Fost. 268.

(*m*) R. v. Leggett, 8 C. & P. 191. Alder-  
son, B., Williams and Coltman, JJ.

#### AMERICAN NOTE.

<sup>1</sup> Guardians who have the custody of the same seems to be the case in America.  
children may correct their wards. R. v. Stanfield v. S., 43 Tex. 167. Armstrong v. Cheeseman, 7 C. & P. 455, *post*, p. 137, and Walkup, 12 Grat. 608.

sons having authority *in foro domestico*, may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. (*mm*) But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, the death ensuing will be either murder or manslaughter, according to the circumstances of the case. Where the fact is done with a dangerous weapon, improper for correction, and likely (the age and strength of the party being duly considered) to kill or maim; such as an iron bar, a sword, a pestle, or great staff; or where the party is kicked to the ground, his belly stamped upon, and so killed, it will be murder. (*n*) Thus, where a master had employed his apprentice to do some work in his absence, and on his return found it had been neglected, and thereupon threatened to send the apprentice to Bridewell, to which the apprentice replied, 'I may as well work there, as with such a master;' upon which the master struck the apprentice on the head with a bar of iron which he had in his hand, and the apprentice died of the blow; it was held murder: for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as may probably kill them; otherwise, under pretence of correction, a parent may kill his child; and a bar of iron is no instrument of correction. (*o*)

The prisoner having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right side of the head, on the temple, and caused her death soon afterwards. The stool was of sufficient size and weight to give a mortal blow: but the prisoner did not intend, at the time she threw it, to kill the child. These facts were stated in a special verdict: but the matter was considered of great difficulty, and no opinion was ever delivered by the judges. (*p*)

In the foregoing case, the counsel for the prisoner cited the following case: — A shepherd boy had suffered some of the sheep, which he was employed in tending, to escape through the hurdles of their pen. The boy's master, the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died. Nares, J., in his directions to the jury, after stating that every master had a right moderately to chastise his servant, but that the chastisement must be on just grounds, and with an instrument properly adapted to the purposes of correction, desired them to consider, whether the stake, which, lying on the ground, was the first thing the prisoner saw, in the heat of his passion, was, or was not, under such circumstances, and in such a situation, an improper instrument. For that the using a weapon from which death is likely to

(*mm*) This right is expressly saved by the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 24.

(*n*) 1 Hawk. P. C. c. 29, s. 5. 1 Hale, 453, 473. R. v. Keite, 1 Lord Raym. 144.

(*o*) R. v. Grey, Kel. 64. Post. 262.

(*p*) R. v. Hazel, 1 Leach, 368. *Ante*, p. 45.

ensue, imports a mischievous disposition; and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore, if the jury should think the stake was an improper instrument, they would further consider whether it was probable that it was used with an intent to kill; that if they thought it was, they must find the prisoner guilty of murder; but if they were persuaded it was not done with an intent to kill, the crime would then at most amount to manslaughter. The jury found it manslaughter. (q) In this case it is presumed that the learned judge must be understood as meaning, that if the jury should think the instrument so improper as to be dangerous, and likely to kill or maim, the age and strength of the party killed being duly considered, the crime would amount to murder; as the law would in such case supply the malicious intent; but that if they thought that the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill.

A mother, being angry with one of her children for not having prepared her dinner, as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a passion, and she took up a small piece of iron, used as a poker, intending to frighten him, and seeing she was very angry, he ran towards the door, when she threw the poker at him, and the iron struck the deceased, who happened to be coming in at the moment, on the head, and killed him: it was held, that when a blow intended for A. lights upon B., being given in a sudden transport of passion, if, supposing A. had been struck and died, it would have amounted to manslaughter, it is no less manslaughter if it causes the death of B., and there was no doubt, if the child at whom the blow was aimed had been struck and died, it would have been manslaughter; and so it was under the present circumstances. (r)

Though the correction exceed the bounds of moderation, the Court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability, occasion death, though the party were hurried to great excess. A father, whose son had frequently been guilty of stealing, and who, upon complaints made to him of such thefts, had often corrected the son for them; at length, upon the son being charged with another theft, and resolutely denying it, though proved against him, beat him, in a passion, with a rope, by way of chastisement for the offence, so much that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge, by whom the father was tried, consulted his colleague in office, and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter; and so it was ruled. (s)

(q) *R. v. Wiggs*, Norfolk Sum. Ass. 1784. 1 Leach, 378, note (a).

(r) *R. v. Connor*, 7 C. & P. 438, J. A. Park and Gaselee, JJ. See *R. v. Griffin*, *post*, p. 138.

(s) Anon. Worcester Spr. Ass. 1775, Serjt. Forster's MS. 1 East, P. C. c. 5, s. 37, p. 261.

The prisoner was aunt to the deceased, a girl, about fifteen, who, with her sister, who was two or three years younger, had been placed, after their mother's death, under the prisoner's care, who employed them in stay-stitching fourteen or fifteen hours a day, and, when they did not do the required quantity of work, severely punished them with the cane and the rod. The deceased was in a consumption, and did not do so much work as her sister, and, in consequence, was much oftener and more cruelly punished by the prisoner, who accompanied her corrections with very violent and threatening language, and said that she was sure that she was acting the hypocrite and shamming illness, and that she had a very strong constitution. The surgeon said she died from consumption, but that her death was hastened by the treatment she had received. Under these circumstances, the counsel for the prosecution thought there was not proof of malice sufficient to constitute the crime of murder, as the prisoner always alleged that she believed the girl was shamming illness, and was really able to do the work required, and which it appeared her younger sister actually did, and the Court concurred in that opinion. (t)

On an indictment for manslaughter, it appeared that the prisoner, a schoolmaster, having the care of the deceased, a boy of thirteen or fourteen, wrote to his father, stating that the boy was obstinate, and that, were he his own child, he should, after warning him, as he had done, subdue his obstinacy, by chastising him severely, and, if necessary, he should do it again and again, and continue it again even if he held out for hours. The father replied, 'I do not wish to interfere with your plan.' On the night of the next day after this letter, the prisoner took the boy into a room downstairs, and beat him for about two hours, between ten and twelve, with a thick stick; using also a skipping rope. About midnight the prisoner was heard dragging or pushing the boy upstairs to his bed-room, and there he beat him again, until about half-past twelve, when the beating and crying suddenly stopped. About seven the next morning, the prisoner said he had found the boy dead, and almost stiffening. A medical examination shewed that the thighs and other parts of the body were covered with bruises, and that there had been profuse bleeding and extravasation of blood caused by excessive and protracted beating, and that the immediate cause of death was exhaustion arising therefrom. The medical witnesses stated that upon the evidence, coupled with the prisoner's statement, the boy, at seven o'clock in the morning, must have been dead about six hours; so that their evidence went to shew that he died about the time when the beating was heard suddenly to cease. The prisoner had not avowed the beating until its effects had been discovered by a *post-mortem* examination, and had sent the body home so closely wrapped up that the bruises were not detected until the coverings were removed in consequence of rumours prevailing. There was no *post-mortem* examination prior to the inquest, at which the surgeon, who was called in by the prisoner at seven o'clock, and who had only seen the boy's face, was examined, and the prisoner, who suggested that the boy had

(t) *R. v. Cheeseman*, 7 C. & P. 455, Vaughan, J. The prisoner pleaded guilty of manslaughter.

died of disease of the heart. The stick was at one end an inch thick; at the other it was edged with brass about the circumference of a sixpence, and there were holes in the shins of the deceased corresponding therewith, and which the medical witness thought must have been produced by poking therewith. The prisoner and his wife had been for some time going up and down stairs engaged in washing out the stains of blood in the night. Cockburn, C. J.: 'By the law of England, a parent or a schoolmaster, who for this purpose represents the parent, and has the parental authority delegated to him, may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always however with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature and degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if death ensues it will be manslaughter' [at least]; and (after commenting on the evidence) 'It is true that the father authorised the chastisement, but he did not, and no law could, authorise an excessive chastisement. There can be no doubt that the prisoner thought the boy obstinate, but that did not excuse extreme severity and excessive punishment.' (u)

In another case, Martin, B., after consulting Willes, J., said, 'The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable; and the only question for the jury to decide is whether the child's death was accelerated or caused by the blows inflicted by the prisoner.' (v)

The prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; the apprentice not having been suffered to lie in a bed, on account of the vermin, but being made to lie on the boards for some time without covering, and without common medical care. In this case, the medical persons who were examined were of opinion, that the boy's death was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home; and they inclined to think, that if he had been properly treated when he came home, he might have recovered. But, though some harsh expressions were proved to have been spoken by the prisoner to the boy, yet there was no evidence of any personal violence having been used by the prisoner; and it was proved that

(u) *R. v. Hopley*, 2 F. & F. 202. The indictment was for manslaughter: it certainly ought to have been for murder.

(v) *R. v. Griffin*, 11 Cox, C. C. 402.<sup>1</sup>

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#### AMERICAN NOTE.

<sup>1</sup> In America, considerable latitude has been shewn as to the nature and degree of punishments inflicted by parents on children. *S. v. Jones*, 95 N. C. 588; 59 Am. R. 232. *Neal v. S.*, 54 Ga. 281.



the apprentice had had sufficient sustenance ; and the prisoner had a general good character for treating his apprentices with humanity, and had made application to get this boy into the hospital. Under these circumstances, the Recorder left it to the jury to consider, whether the death of the boy was occasioned by the ill-treatment he received from his master, after returning from Bridewell, and whether that ill-treatment amounted to evidence of malice, in which case they were to find him guilty of murder. At the same time they were told, with the concurrence of Gould, J., and Hotham, B., that if they thought otherwise, yet, as it appeared that the prisoner's conduct towards his apprentice was highly blamable and improper, they might, under all these circumstances, find him guilty of manslaughter ; which they accordingly did. (*w*) And upon the question being afterwards put to the judges, whether the verdict were well found, they all agreed that the prisoner should be burned in the hand and discharged. (*x*)

In a note upon the foregoing case, Mr. East says, 'I have been the more particular in stating the ground of the decision in this case, because Gould, J.'s, note of the case, from whence this is taken, is evidently different from another report (*y*) of the opinion of the judges in this case, from whence it might be collected, that there could be no gradation of guilt in a matter of this sort, where a master, by his ill-conduct or negligence, had occasioned or accelerated the death of his apprentice, but that he must either be found guilty of murder or acquitted ; a conclusion which, whether well or ill founded, certainly cannot be drawn from this statement of the case. The same opinion, however, is stated in the Old Bailey Sessions Papers, to have been thrown out by the Recorder in *Wade's case*.' (*z*)

**Careless performance of ordinary duties.** — If persons, in pursuit of their lawful and common occupations, see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, the death which ensues will be murder. Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be, whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred, (*a*) and the act will amount to murder from its gross impropriety. (*b*) So, if a person driving a cart or other carriage, happen to kill, and it appear that he saw, or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder. (*c*) The act is wilful and deliberate, and manifests a heartless regard of social duty. (*d*)

Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter, at least, on account of such

(*w*) *R. v. Self*, O. B. 1770, MS. Gould, J. 1 East, P. C. c. 5, s. 13, pp. 226, 227.

(*z*) *Easter T.* 16 Geo. 3, De Grey, C. J., and Ashhurst, J., being absent.

(*y*) 1 Leach, 137.

(*z*) *R. v. Wade*, O. B. Feb. 1784. Sess. Pap.

(*a*) *Ante*, p. 122.

(*b*) 3 Inst. 57. 4 Blac. Com. 192. 1 East, P. C. c. 5, s. 38, p. 262.

(*c*) 1 Hale, 475. *Fost.* 263. 1 East, P. C. c. 5, s. 38, p. 262.

(*d*) *Fost.* 263. As to when a person causing death by the negligent driving of a carriage is guilty of manslaughter, see *post*, tit. *Manslaughter*.

negligence. (e) Thus, if workmen throw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it will be manslaughter. (f) It was a lawful act, but done in an improper manner. It has, indeed, been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution used. (g) But this must be understood with some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution be used, the party may be excusable; but when the streets are full, such ordinary caution will not suffice; for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. (h)

The prisoner, who was an attendant at a lunatic asylum, turned on the hot-water tap by mistake into a bath in which accidentally a lunatic had remained after having been told by the prisoner to get out. The prisoner thought the man had got out of the bath, and his attention being called away at the moment, he did not observe that the man was still there. Lush, J., directed the jury that if they took this view of the case it was an accident. (i)

**Persons using dangerous articles, or instruments.**—As the degree of caution to be employed depends upon the probability of danger, it follows that persons using articles or instruments, in their nature peculiarly dangerous, must proceed with such appropriate and reasonable precaution as the particular circumstances may require. Thus, though where one lays poison to kill rats, and another takes it and dies, this is misadventure: yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for that would betoken great inadvertence, and might in some cases amount to manslaughter. (j)

A., having deer frequenting his corn field, out of the precinct of any forest or chase, set himself in the night-time to watch in a hedge, and set B., his servant, to watch in another corner of the field, with a gun charged with bullets, giving him orders to shoot, when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed into the corn himself, and the servant, supposing it to be the deer, shot and killed the master. This was ruled to be misadventure, on the ground that the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. It seemed, however, to the learned judge who so decided, (k) that if the master had not given such direction, which was the occasion of the mistake, it would have been

(e) Fost. 262. 1 East, P. C. c. 5, 38, p. 262.

(f) Fost. 262. 1 Hale, 475. *Item si putator, ex arbore ramo dejecto, servum tuum transeuntem occiderit, si prope viam publicam aut vicinalem id factum est, neque proclamavit, ut casus evitari posset, culpæ reus est; sed si proclamavit, nec ille curavit præcavere, extra culpam est putator. Æque extra culpam esse intelligitur si seorsum a viâ forte, vel in medio fundo cædebat, licet non proclamavit,*

*quia in eo loco nulli extraneo jus fuerat vendi.* Just. Inst. L. iv. tit. iii. s. 5.

(g) R. v. Hull, Kel. 40.

(h) Fost. 263.

(i) R. v. Finney, 12 Cox, C. C. 625. The prisoner was indicted for manslaughter, and the jury acquitted him.

(j) 1 Hale, 431. 1 East, P. C. c. 5, s. 40, p. 266.

(k) Lord Hale.

manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark. (*l*) But upon this it has been remarked, that if, from all the other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act: and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prosecution of some lawful act. (*m*). By the same rule as to due caution being observed, it has been holden to be misadventure only, where a commander coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such; the sentinel not being able to distinguish his commander, under such circumstances, from an enemy. (*n*)

But it should be observed, that the caution which the law requires, is not the utmost caution that can be used: it is sufficient that a reasonable precaution be taken; such as is usual and ordinary in similar cases; such as has been found, by long experience in the ordinary course of things, to answer the end.

## SEC. XI.

### *Aiders and Abettors.*

In order to make an abettor to a murder or manslaughter principal in the felony, he must be present aiding and abetting the fact committed. The presence, however, need not always be an actual standing by within sight or hearing of the fact; for there may be a constructive presence, as when one commits a murder and another keeps watch or guard at some convenient distance. (*o*) But a person may be present, and, if not aiding and abetting, be neither principal nor accessory: as, if A. happen to be present at a murder and take no part in it, nor endeavour to prevent it, or to apprehend the murderer, this strange behaviour, though highly criminal, will not of itself render him either principal or accessory. (*p*)

If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. (*q*) So if A. assault B. of malice and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (*r*) Several persons conspired to kill Dr. Ellis, and they set upon him accordingly,

(*l*) 1 Hale, 476. The same case is previously mentioned, 1 Hale, 40, where the learned author seems to think that the offence amounted to manslaughter; but considers the question as of great difficulty. The case was, however, determined at Peterborough, as stated in the text.

(*m*) 1 East, P. C. c. 5, s. 40, p. 266.

(*n*) 1 Hale, 42.

(*o*) 1 Hale, 615. Fost. 350. 4 Blac. Com. 34.

(*p*) Fost. 350. 1 Hale, 439.

(*q*) 1 East, P. C. c. 5, s. 121, p. 350.

(*r*) 1 Hale, 446. *Ante*, p. 4.

when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master, but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The Court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected, as the malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis: but, as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter and three others of murder, and the three were executed. (s)

It has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present aiding and abetting him in the murder, is good: for (by Holt, C. J.) 'though the indictment be against the prisoner for aiding, assisting, and abetting A., who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder.' (t) And though anciently the person who gave the fatal stroke was considered as the principal, and those who were present aiding and assisting, only as accessories; yet it has long been settled that all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are called principals in the second degree. (u) So that if A. be indicted for murder, or manslaughter, and C. and D. for being present and assisting A., and A. appears not, but C. and D. appear, they shall be arraigned; and if convicted shall receive judgment, though A. neither appear nor be outlawed. (v) And if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all; for it is only a circumstantial variance, and in law it is the stroke of all that were present aiding and abetting. (w)

Where the first count charged Downing as principal in the first degree in the murder of W. Cooper by shooting him with a gun, and Powys as being present aiding and abetting Downing, and the second count charged Powys as principal in the first degree, alleging that he 'afterwards' assaulted 'the said W. Cooper,' &c., and Downing as being present aiding and abetting Powys; and the jury found both guilty, but added that they were not satisfied which of the prisoners fired the gun, but were satisfied that one of them fired the gun, and that the other was present aiding and abetting: it was thereupon submitted that, the prisoners being charged differently in the two counts, the jury must be instructed to find them guilty on one or the other of the counts only; but Coltman, J., thought that, as the

(s) *R. v. Salisbury*, Plowd. 97.

(t) *R. v. Wallis*, Salk. 384. *R. v. Taylor*, 1 Leach, 360. 1 East, P. C. c. 5, s. 121, p. 351.

(u) 1 Hale, 437. Plow. Com. 100 a.

(v) 1 Hale, 437. Plow. Com. 97, 100. Gythin's case.

(w) 1 Hale, 438. Plow. Com. 98, a. 9 Co. 67, b. *R. v. Mackally*, 1 East, P. C. c. 5, s. 121, p. 350. *Turner's case*, 1 Lew. 177, Parke, B. *R. v. Phelps*, C. & M. 180.

evidence equally supported either count, it was not necessary to give any such direction, and therefore told them that if they were satisfied that one of the two fired the gun, and that the other was present aiding and abetting, they were both liable to be found guilty, and the jury returned a general verdict of guilty; and, upon a case reserved, the conviction was held right, for both counts substantially related to the same person killed and to one killing. (x)

Where a count charged Thom with murder, and Tyler and Price with being present aiding and abetting in the commission of the murder, and it appeared that Thom was insane at the time of committing the murder, it was held that Tyler and Price could not be convicted on this count. (y) Where a count charged Tyler and Price as principals in the first degree with a murder, and it appeared that Thom, an insane person, collected a number of persons together, who armed themselves, having a common purpose of resisting the lawfully constituted authorities, Thom having declared that he would cut down any constables who came against him, and a constable having come with his assistants, and a warrant to apprehend Thom, Thom, in the presence of Tyler and Price, who were two of his party, shot one of the assistants; it was held that the prisoners were guilty of murder as principals in the first degree, and that it was no ground of defence that Thom and his party had no distinct or particular object in view when they assembled together and armed themselves; because, if their object was to resist all opposers in the commission of any breach of the peace, and for that purpose the parties assembled together and armed themselves with dangerous weapons, however blank the mind of Thom might be as to any ulterior purpose, and however the minds of the prisoners might be unconscious of any particular object, still, if they contemplated a resistance to the lawfully constituted authorities of the country, in case any should come against them while they were so banded together, there would be a common purpose, and they would be answerable for anything which they did in the execution of it. (z)

He that counsels, commands, or directs the killing of any person, and is himself absent at the time of the fact being done, is an accessory to murder before the fact. (a) And though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact; so that if A. bid his servant to hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw or heard of, to do it, A. is an accessory before the fact. (b)

If A. advise B. to kill another, and B. does it in the absence of A., in such case B. is principal, and A. is accessory in the murder. And this holds, even though the party killed be not in

(x) *R. v. Downing*, 1 Den. C. C. 52, Maule, J., *diss.* See 2 C. & K. 382, for the indictment. Now the proper course in such cases would be simply to allege that the prisoners murdered according to the 24 & 25 Vict. c. 100, s. 6; *post*, p. 156.

(y) *R. v. Tyler*, 8 C. & P. 616. Lord Denman, C. J. *Sed quare.*

(z) *R. v. Tyler*, *ibid.*

(a) 1 Hale, 435.

(b) *Fost.* 125.

*rerum naturâ* at the time of the advice given; so that if a man advise a woman to kill her child as soon as it shall be born, and she kills it when born in pursuance of such advice, he is an accessory to the murder. (c)

If A. commands B. to beat C., and B. beat him so that he dies, A. being absent, B. is guilty of murder as principal, and A. as accessory; the crime having been committed in the execution of a command which naturally tended to endanger the life of another. (d) And *à fortiori*, therefore, if a man command another to rob any person, and he in robbing kill him, the person giving such command is as much an accessory to the murder, as to the robbery which was directly commanded: and it is also said, that if one command a man to rob another, and he kill him in the attempt but do not rob him, the person giving such command is guilty of the murder, because it was the direct and immediate effect of an act done in execution of a command to commit a felony. (e)

Where an indictment charged certain persons with the murder of N. Batty at Paris, and the prisoner as accessory before the fact, and it appeared that when the Emperor and Empress of the French arrived at the opera-house in the Rue Lepelletier, Paris, the street being full of people, as the carriage approached the entrance two grenades were first thrown and exploded, and a third about a minute afterwards, and that Batty was one of the Gardes de Paris on duty at the time, and that he died of wounds caused by the explosion; Lord Campbell, C. J., told the grand jury, 'as to the objection that the prisoner could have had no intention that those who were killed by the explosion of the grenades should be put to death, it may be observed that such a question can only arise where the principal does not act in strict conformity with the plans and instructions of the accessory. But here, if the prisoner was privy to the plot, the other persons in throwing the grenades as they did must be considered as having acted strictly in conformity with his plans and instructions, and he is answerable as accessory for the consequences.' And his Lordship added: 'The approved test is, "was the event alleged to be the crime to which the accused is charged to be accessory, a probable consequence of the act he committed?"' (h)

But if the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. Thus if A. persuade B. to poison C., and B. accordingly give poison to C., who eats part of it, and gives the rest to D., who is killed by it, A. is guilty of a great misdemeanor only in respect of D., but is not an accessory to his murder: because it was not the direct and immediate effect of the act done in pursuance of the command. (i) And if A. counsel or command B. to beat C. with a small wand or

(c) 1 Hale, 617. 2 Hawk. P. C. c. 28, s. 18. 4 Blac. Com. 37. Dy. 185.

(d) 1 Hale, 435. 2 Hawk. P. C. c. 29, s. 18. 4 Blac. Com. 37.

(e) 2 Hawk. P. C. c. 29, s. 18.

(h) R. v. Bernard, 1 F. & F. 240.

(i) Id. *ibid.* See *quære*, et vide R. v. Michael, 2 M. C. C. R. 120, *post*, and 1 Hale, 431.

rod, which would not in all human reason cause death, and B. beat C. with a great club, or wound him with a sword, whereof he dies, it seems that A. is not accessory; because there was no command of death, nor of anything that could probably cause death; and B. departed from the command in substance, and not in circumstance. (*j*) But if the crime committed be the same in substance with that which was commanded, and vary only in some circumstantial matters; as where a man advises another to kill a person in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poison him, and he stabs or shoots him; the person giving such command is still accessory to the murder; for the substance of the thing commanded was the death of the party killed, and the manner of its execution is a mere collateral circumstance. (*k*)

An accessory *after the fact*, in murder, as in any other felony, may be where a person, knowing a murder to have been committed, receives, relieves, comforts, or assists the offender; as to which kind of accessory some points are noticed in a former volume. (*l*) And the question for the jury in such a case is, whether such person, knowing the offence had been committed, was either assisting the murderer to conceal the death, or in any way enabling him to evade the pursuit of justice. (*m*) It may be here observed, however, that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make such person accessory to the homicide; for till death ensues there is no felony committed. (*n*)

## SEC. XII.

*Of the Indictment, Trial, &c.*

**Indictment.** — Although the prisoner may be charged with murder by the inquisition of the coroner, it is usual also to prefer an indictment against him. And it is said to be proper to frame an indictment for the offence of murder in all cases where the degree of the offence is at all doubtful; (*o*) and unquestionably where there is any reasonable ground for supposing that the facts, as they will be given in evidence, may lead to the conclusion of the higher offence having been committed, it will be culpable not to prefer an indictment for murder.

By the 24 & 25 Vict. c. 100, s. 6 (see *post*, p. 156), in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, 'but it shall be sufficient in any indictment

(*j*) 1 Hale, 436.(*k*) 2 Hawk. P. C. c. 29, s. 20. 4 Blac. Com. 37.(*l*) Vol. i. p. 176; and see *R. v. Good*, 1 C. & K. 184, vol. i. p. 159, as to a wife being accessory after the fact to her husband.(*m*) *R. v. Greenacre*, 8 C. & P. 35, Tindal, C. J., Coleridge and Coltman, JJ.(*n*) 4 Blac. Com. 38. 2 Hawk. P. C. c. 29, s. 35. But it should seem that he is accessory to the maliciously wounding. *C. S. G.*(*o*) 1 East, P. C. c. 5, s. 105, p. 340.

for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased, and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased.'

From this it would seem that it is unnecessary for the indictment to contain allegations of time and place. If a time is laid it would seem that the date of the striking the blow should be given. If from the evidence it appear that the deceased died more than a year and a day from this date the prisoner will be entitled to be acquitted, (*p*) and in this sense no doubt the date is material.

With respect to the place in which the indictment is to be preferred, it will be necessary to state some of the legislative enactments by which trials for murder are regulated.

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county: (*q*) but by the 2 & 3 Edw. 6, c. 24, s. 2, it was enacted, that the trial should be in the county where the death happened. That statute was, however, repealed by the 7 Geo. 4, c. 64, s. 12.

And now, therefore, the prisoner may be sued either in the county where the injury was given or in that in which the death took place.<sup>1</sup> The venue, as stated in the margin, will, it seems, be sufficient allegation of the place. (*r*)

**Duty of coroner.** — By the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 3, 'Where a coroner is informed that the dead body of a person is lying within his jurisdiction, and there is reasonable cause to suspect that such person has died either a violent or an unnatural death, or has died a sudden death of which the cause is unknown, or that such person has died in prison or in such place or under such circumstances as to require an inquest in pursuance of any Act, the coroner, whether the cause of death arose within his jurisdiction or not, shall, as soon as practicable, issue his warrant for summoning not less than twenty-three good and lawful men to appear before him at a specified time and place, there to inquire into the death of such person as aforesaid.'

**Jury disagreeing.** — By sec. 4 (5), 'In case twelve at least of the jury do not agree on a verdict, the coroner may adjourn the inquest to the next sessions of oyer and terminer or gaol delivery held for the county or place in which such inquest is held, and if, after the jury have heard the charge of the judge or commissioner holding such sessions, twelve of them fail to agree on a verdict, the jury may be discharged by such judge or commissioner without giving a verdict.'

By sec. 6, power is given to the High Court of Justice, on the appli-

(*p*) 1 Hawk. P. C. c. 23, s. 90.

(*r*) 14 & 15 Vict. c. 100, s. 23. See *R. v.*

(*q*) 2 Hawk. P. C. c. 25, s. 36. 1 East, Ripley, 17 Cox, C. C. 120.  
P. C. c. 5, s. 128, p. 361.

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#### AMERICAN NOTE.

<sup>1</sup> This is so also in America. *Riley v. S.*, 9 Kemp, 646. *Nash v. S.*, 2 Greene, 286.



cation of the Attorney-General, to order an inquest to be held if the coroner refuses or neglects to hold one, or has been guilty of irregularity in holding it.

**Jurisdiction.** — By sec. 7, 'The coroner only within whose jurisdiction the body of a person upon whose death an inquest ought to be holden is lying shall hold the inquest, and where a body is found dead in any creek, river, or navigable canal within the flowing of the sea, where there is no deputy coroner for the Admiralty of England, the inquest shall be held only by the coroner having jurisdiction in the place where the body is first brought to land.'

'**Body found in creek, river, &c.** — In a borough with a separate Court of quarter sessions, no coroner, save as is otherwise provided by this Act, shall hold an inquest belonging to the office of coroner except the coroner of the borough or a deputy coroner for the jurisdiction of the Admiralty of England.'

In a borough having no separate Court of quarter sessions, only the county coroner or the deputy coroner of the Admiralty shall hold an inquest.

By sec. 40 (1), 'For the purpose of holding coroners' inquests, every detached part of a county shall be deemed to be within the county by which it is wholly surrounded, or where it is partly surrounded by two or more counties, within the county with which it has the longest common boundary.' (s)

By the 24 & 25 Vict. c. 100, s. 9, 'Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act.' (a)

(s) By sec. 20, 'If in the opinion of the court having cognisance of the case, an inquisition finds sufficiently the matters required to be found thereby, and sufficiently designates the person and offence charged by it, it shall not be quashed for any defects, but may be amended by the proper officer of the Court.' The jurisdiction of the Queen's Bench division to quash an inquisition for irregularity on the face of it is left untouched by this section. *R. v. G. W. Ry. Directors*, 20 Q. B. D. 410.

(a) This clause is framed from the 9 Geo. 4, c. 31, s. 7, and 10 Geo. 4, c. 34, s. 10 (1). By the 9 Geo. 4, c. 31, s. 7, any person charged with any offence specified in this

clause might be examined and committed by any justice of the place where the person so charged was, and thereupon a special commission was to be issued for the trial of such person. By the 10 Geo. 4, c. 34, s. 10, where any person was charged in Ireland with any offence specified in this clause, he might be examined and committed by any justice of the place where the person so charged was, and thereupon he might be tried in that place in the same manner as if his offence had been there committed. This was a much better provision than that in the 9 Geo. 4, c. 31, s. 7, as it got rid of the necessity for a special commission, and avoided a difficulty which was very

Though the 33 Hen. 8, the repealed enactment on this subject, was not confined to offences committed within the King's dominions, yet, in a case where a prisoner at war abroad had entered on board an English merchant ship, and whilst in that capacity had committed an offence upon an Englishman in a foreign country, it was decided that he could not be tried for it here under that statute, on the ground that he could not be deemed a subject of this country. The offender, *Depardo*, was a Spaniard, and taken prisoner at sea, and whilst abroad, volunteered on board an Indiaman, and received the usual bounty and part of his pay for about three months, which he served on board the Indiaman, and the Indiaman was lying at Canton in a part of the Canton river, about a third of a mile in width, within the tideway, at the distance of about eighty miles from the sea; the prisoner went ashore with the deceased, an Englishman, and there mortally wounded the deceased, who was carried on board ship, and died there the next day. Upon a case reserved, it was urged, that the prisoner was not liable to be tried here, because he never became subject to the laws of this country; that he was not so by birth, and did not become so by entering on board the Indiaman. No judgment was given, but the prisoner was discharged. (b)

An indictment charged, in substance, that the prisoner, at Lisbon, in the kingdom of Portugal, in parts beyond the seas without England, one H. G., in the peace of God and our lord the King, then and there being, feloniously did assault, shoot, and murder, against the peace of our said lord the King. After conviction, it was objected — 1st, that the offence being out of the King's dominions, and within the dominions of a foreign state, was not triable under the 33 Hen. 8; and, 2nd, that the prisoner and the deceased should have been stated to have been subjects of the King at the time. But, after argument, the judges held that the offence was triable here, though committed in a foreign kingdom, the prisoner and the deceased being both subjects of this realm at the time; and that the stating H. G.

likely to arise under the 9 Geo. 4, c. 31, s. 7; for the special commission issued under that section recited the offence charged before the justice, and authorised the trial for that offence, and a fatal variance might well arise on the trial between the facts proved and the offence charged before the justice. The present section is substantially the same as the 10 Geo. 4, c. 34, s. 10, but uses the terms of 9 Geo. 4, c. 31, s. 8, and under it the party charged may be examined before any justice of the place where he is, and tried in the same place. The words 'dealt with' apply to justices of the peace; 'inquired of' to the grand jury; 'tried' to the petit jury; and 'determined and punished' to the Court; as was held by Lord Wensleydale in *R. v. Ruck*, 1 Russ. C. & M. 827. The 9 Geo. 4, c. 31, s. 7, and 10 Geo. 4, c. 34, s. 10 (1), were confined to accessories after the fact in manslaughter, but the present clause is so framed as to include an accessory before the fact in that offence, wherever there can be such an accessory, as to which see *post*, *Manslaughter*. This clause was carefully framed

in order to remove any question as to the killing of a foreigner being within it; and instead of the words of the 9 Geo. 4, c. 31, s. 7, 'where any of His Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder,' &c., (which, from their collocation, might afford an argument that no murder was within the clause unless it were committed by a British subject, and therefore a British subject would not be within it if he were accessory to a murder by an alien), the wording of this clause has been adopted so as to include an accessory to any murder by whomsoever committed. See the note to the clause for conspiracy to murder, 24 & 25 Vict. c. 100, s. 4, *post*.

(b) *R. v. Depardo*, 1 Taunt. 26; *R. & R.* 134. It is clear the case fell within no statute, as the wound was on shore, and the death within the Admiralty jurisdiction. See *R. v. de Mattoa*, *post*, p. 150; and *R. v. Coombes*, *post*, p. 152. According to *R. & R.*, the indictment was for manslaughter.

to be in the King's peace at the time, sufficiently imported that he was the King's subject at the time; and that the statement that this was against the King's peace, sufficiently imported that the prisoner was also a subject of this realm at that time. (c) But it was considered that an indictment upon the 9 Geo. 4, c. 31 (now repealed), must aver, that the prisoner and deceased were subjects of His Majesty, but that the declarations of the prisoner were evidence to go to the jury to prove this fact. The indictment charged the murder to have been committed 'at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-bow, in the ward of Cheap,' &c. The grand jury objected to finding the bill, as it stated the death to have occurred in two different places. Bayley, J. (having conferred with Bosanquet, J., and the Recorder), directed the words 'to wit, at the parish of St. Mary-le-bow, in the ward of Cheap,' &c., to be struck out. His lordship also said, that it was deemed by the Court to be necessary to have inserted in the bill an allegation that the prisoner and the deceased were subjects of His Majesty; and the bill was so amended accordingly. Upon the trial it appeared that the deceased was killed in a duel at Boulogne, and that he was an Englishman, born at Islington; and the prisoner had said he was an Irishman, and had come from Kilkenny. It was objected that, under the 9 Geo. 4, c. 31 (now repealed), it was necessary to prove that the parties were natural-born subjects of His Majesty; the present Act differed from the 33 Hen. 8, c. 23, the words of which were 'any person or persons.' Since it never could have been intended that this Act should apply to foreigners domiciled in England, or naturalised either by Act of Parliament, or by service to the state, and that it was necessary to prove, by some one acquainted with the fact, where the prisoner was born, which was a fact the prisoner could not know of his own knowledge. But it was held, that the declaration of the prisoner, unexplained, was, as against himself, evidence to go to the jury; and the case was left to the jury to say, whether they were satisfied by the evidence that the prisoner was a British *born* subject; for that they must be quite satisfied that such was the fact before they could pronounce him guilty. (d)

Where an indictment for manslaughter stated that the prisoner being a subject of His Majesty, on land out of the United Kingdom, to wit, at Zanzibar, in the East Indies, did make an assault on J. K., and did give him divers mortal wounds, &c., of which he died, at Zanzibar aforesaid, and it appeared that the prisoner, a Spaniard, being in England, entered into certain articles to serve in a ship bound on a voyage to the Indian seas, and elsewhere, on a seeking and trading voyage (not exceeding three years' duration), and back to the United Kingdom, and on the ship's arrival at Zanzibar, an island in the Indian seas, under the dominion of an Arab king, the captain left the vessel, and set up in trade there, and engaged the prisoner (who was a black, and said to be by birth the son of a gov-

(c) *R. v. Sawyer*. MS. Bayley, J.; R. & R. 294; and 2 C. & K. 101. In the latter report there is a very full account given of the previous cases. Another objection was that the indictment ought to have concluded

*contra formam statuti*: but that was also overruled.

(d) *R. v. Helsham*, 4 C. & P. 394, coram Bayley and Bosanquet, JJ., and Knowlys, R. See *ante*, p. 147, note (a).

ernor on another part of the African coast), to act as interpreter, the new captain not requiring his services, but the rest of the crew not consenting. The ship went one or two short voyages without the prisoner, and having returned to anchor in a roadstead, a few hundred yards from Zanzibar, and the crew being allowed to go on shore, some dispute arose between the prisoner and the deceased, who was one of the crew, which led to the blows, of which the deceased afterwards died on board the ship. It was held that there was no evidence of the prisoner being a British subject or under British protection. To claim his allegiance, it must at least be shewn, that he was under British protection. And although he was on board a British ship for a time, yet it seemed as if the articles were abandoned, and he was living on shore, and had been so for months. And, secondly, that the offence was alleged to have been committed on land out of the United Kingdom, but though the blows were given on land, the death took place on board ship, and there was no clause in the 9 Geo. 4, c. 3, providing for such a case. (e)

The prisoner was convicted on an indictment under the 9 Geo. 4, c. 31, s. 7, (now repealed) for murder. The murder was committed at Smyrna. The prisoner, a native of Malta, of the age of twenty-one, was residing at Smyrna, under a passport from the Governor of Malta. The person murdered was a Dutchman. Malta is part of Her Majesty's dominions. Upon a case reserved it was contended that it was necessary, under the 9 Geo. 4, c. 31, s. 7, to constitute the offence of murder or manslaughter that the person killed should be a British subject; but the judges were unanimously of opinion that the conviction was right. (f)

A case which excited great interest was tried under the former clause. In it the prisoner was charged as accessory before the fact in England to a murder committed in France; (g) and many points were taken at the close of the case, and reserved. (h)

(e) *R. v. M. A. de Mattos*, 7 C. & P. 458, Vaughan and Bosanquet, JJ. It was doubted in this case by Rolfe, S. G., whether the limitation put upon the 9 Geo. 4, c. 31, s. 7, in *R. v. Helsham*, was correct, and the Court seem to have thought that that construction was too narrow. Vaughan, J., in charging the grand jury said, 'there are other ways which may constitute a man a British subject; as, for instance, he may owe allegiance for protection:' and the case was decided on the ground that the prisoner was not a British subject in any sense of those words. C. S. G.

(f) *R. v. Azzopardi*, 2 M. C. C. R. 288; 1 C. & K. 203. It will be seen that the new clause expressly includes the killing of an alien. See *ante*, p. 147.

(g) The first count alleged that Orsini, Gomez, and Rudio at Paris murdered N. Batty; and that the prisoner incited, &c., them to commit the murder; the second count was similar, but described the deceased as unknown. The third count was framed in the old form before the 14 & 15 Vict. c. 100, by the Editor; because he thought it might be contended that the 14 & 15 Vict. c. 100, s. 4, did not extend to indictments

against accessories; and it alleged an assault, &c., by the principals, and charged the prisoner with inciting, &c. The fourth count charged the prisoner, being a subject of the Queen, with murdering Batty at Paris. The fifth was like the fourth, but described the deceased as unknown. C. S. G.

(h) *R. v. Bernard*, 1 F. & F. 240. The points were: 1. That the prisoner was not one of Her Majesty's subjects within the 9 Geo. 4, c. 31, s. 7. 2. The prisoner was not an accessory before the fact to any murder within that section. 3. There was no proof of any murder having been committed within that section. 4. That the murder was committed by aliens on aliens in France. 5. No evidence of acts done by the prisoner on land out of the United Kingdom, and without the Queen's dominions, or of any act done by any other person in pursuance of any authority from him on land out of the United Kingdom and without the Queen's dominions, was receivable in evidence on this trial. 6. That the principal offence of murder charged in the first three counts was not alleged to have been committed by any of Her Majesty's subjects. 7. That by the special commission the

Where a person was struck, &c., upon the high seas, and died upon shore, it was holden that the admiral had no cognisance of the offence by virtue of his commission. (i) And it was doubtful whether such offence could be tried at common law : (j) the 2 Geo. 2, c. 21, therefore made provisions for such cases, but that Act was repealed by the 9 Geo. 4, c. 31, which was repealed by the 24 & 25 Vict. c. 95, and by the 24 & 25 Vict. c. 100, s. 10, 'Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.' (k)

Upon an indictment for manslaughter it appeared that the prisoner was a Frenchman by birth, and a naturalised citizen of the United States, and not a subject of the Queen. He shipped on board an American ship at New York, and signed articles to serve as a seaman therein, and so did the deceased, who was a German by birth, and not a subject of the Queen. The ship was American owned, commanded by an American master, and sailed under the flag of the United States. The prisoner during the voyage to Liverpool exercised much cruelty to the deceased, of which he died in a hospital in Liverpool on the same day the ship arrived there; the last act of cruelty was committed on the high seas four days before the ship arrived at Liverpool; and, upon a case reserved, it was held that the prisoner was not liable to be tried in England under the 9 Geo. 4, c. 31, s. 8, (now repealed) as that section was obviously intended to prevent a defeat of justice, which, without it, might have

Court had only jurisdiction to try the prisoner as accessory before the fact, and had no jurisdiction to try the prisoner as principal. 8. That the prisoner, being an alien, could not be tried as principal for a murder alleged in the 4th and 5th counts to have been committed at Paris. As to the 1st objection, it is clear that a foreigner resident in England is a subject of the Queen; all the authorities prove that rule in general, and 1 Hale, 542, and Courteen's case, Hob. R. 270, are express that a statute naming the subjects of the Queen includes aliens in England; and besides the 32 Hen. 8, c. 16, s. 9, enacts that every alien, who shall hereafter come into this realm or the dominions of the King, shall be bound by all the laws and statutes of this realm. As to the 2nd, 3rd, 4th, and 6th objections, see the new clause, and the note to sec. 4 relating to conspiracies to murder, *post*. As to the 5th objection, every

case that has been tried where the death was on land abroad is an answer; for such evidence was admitted in all, and necessarily so; for how can a man be tried for any offence abroad unless the acts relating to it done abroad are admissible in evidence? As to the 7th objection, the 11 & 12 Vict. c. 46, s. 1, (now 24 & 25 Vict. c. 94, s. 1,) making every accessory before the fact triable, &c., as a principal, is an answer. As to the 8th objection, see the remarks on the 24 & 25 Vict. c. 94, s. 1, vol. i. p. 180. C. S. G.

(i) 2 Hale, 17, 20. 1 East, P. C. c. 5, s. 131, pp. 365, 366.

(j) *Id.* and 1 Hawk. P. C. c. 31, s. 12.

(k) This clause is taken from the 9 Geo. 4, c. 31, s. 8; and 10 Geo. 4, c. 34, s. 11 (1). This clause is also so altered as to include accessories before the fact in manslaughter. See note (a), *ante*, p. 147.

arisen from the difficulty of trial where the death occurred in a different place from that at which the blow causing it was given; and that section ought not therefore to be construed as making a homicide cognisable in this country by reason only of the death occurring here, unless it would have been so cognisable in case the death had ensued at the place where the blow was given, which the homicide would have been, in this particular case, by sec. 8, if the offender had been a British subject, but not otherwise. (*l*)

Where a person standing on the shore of a harbour fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about a hundred yards from the shore, by which another was maliciously killed on board the boat, it was holden that the trial must be in the Admiralty Court, and not at common law. (*n*)

The prisoner, a foreigner, committed a larceny in England, and went to Hamburgh; a police-officer pursued him thither, and with the assistance of the police of Hamburgh arrested him there, and brought him against his will on board an English steamer, in order that he might be tried for the larceny. The steamer left, the prisoner being in irons, and whilst the steamer was on the high seas, he shot the officer, who died of the wound. If the killing had been by an Englishman in England, it would have been murder. It was contended that as there was no extradition treaty between England and Hamburgh, the arrest and detention were illegal, and the offence only manslaughter; but it was held, on a case reserved, that where the killing was done with the intent of preserving liberty, the crime was reduced to manslaughter; but it must be taken here that the prisoner killed the officer, not to obtain his liberty, but out of revenge and malice prepense; in which case it is murder even if the custody were unlawful. For the prisoner, a foreigner, was in an English ship, and was under the protection of the English laws, and therefore owed obedience to those laws, and was guilty of the crime of murder against those laws—that is to say, he shot a detective officer, not for the purpose of obtaining his liberation, but for revenge and of malice prepense. (*o*)

(*l*) *R. v. Lewis, D. & B. C. C. 182.*<sup>1</sup> *R. v. Coombes, 1785-6.* 1 Hawk. P. C. c. 37, s. 17. 1 Leach, 388. 1 East, P. C. c. 5, s. 131, p. 367.

(*n*) In Ireland it was necessary to issue a special commission under the 11, 12, & 13 Jac. 1, c. 2 (1); and 23 & 24 Geo. 3, c. 14, s. 4 (1), for the trial of all offences committed on the seas; but in England such offences might be tried under the ordinary commissions of Oyer and Terminer, or Gaol Delivery, by the 7 & 8 Vict. c. 2. The present section (24 & 25 Vict. c. 100, s. 68) follows that Act in providing for the trial and form of indictment in such cases, and

renders the law the same in both countries. See vol. i. p. 9, *et seq.*

(*o*) *R. v. Sattler, D. & B. C. C. 525*; see vol. i. p. 19. Hamburgh is sixty miles from the sea, but the tide flows higher up than the place where the steamer was when the prisoner was put on board. The questions reserved were, 'Was the custody of the prisoner on board the steamer lawful, and is there any distinction as to the times when the steamer was in the river Elbe, and whilst she was upon the high seas?' [On this the Court gave no opinion.] And, 'Supposing the custody not to have been lawful, was the killing necessarily only manslaughter?'

#### AMERICAN NOTE.

<sup>1</sup> See Bishop, s. 112, *et seq.* It is the blow but not the death which makes the murder, but there seems great doubt in America as to this. It may be the blow which gives the

jurisdiction apart from the statute. If the death is the result of the blow, the blow is continuous. See *S. v. Shepherd*, 8 Ired. (N. C.) 195. *P. v. Kelly*, 6 Cal. 210.

A few of the general rules relating to the form of the indictment may be mentioned in this place.

If the name of the party killed be known, it should be correctly stated in the indictment; but it is sufficient to describe a party by the name by which he is commonly known. (*p*) A peer should properly be described only by his Christian name, and his name of dignity; as James, Duke of G. (*q*) But it seems that he may be described by his surname also; as William Byron, Baron Byron. (*r*) And although the proper way to describe a baron be to describe him by his Christian name, and his degree in the peerage, as William, Baron B., yet it is sufficient if he be described as William, Lord B. (*s*) If the name of the party killed be not known, it may be laid to be a certain person to the jurors unknown. (*t*) Where a party has a name, an indictment must either state the name or that the name was unknown to the jurors. An indictment stated that the prisoner murdered 'an infant male child, aged about six weeks, and not baptised;' it was objected that the indictment was bad, as it neither stated the name of the child, nor that the name was unknown to the jurors; and, upon a case reserved, the judges held that the objection was good, and the judgment was arrested. (*u*) But where an indictment alleged that the prisoner, a single woman, on the 27th day of August did bring forth a male child alive, and that she afterwards on the day and year aforesaid made an assault, &c., on the said child; it was objected that the indictment was bad, as it neither stated the name of the child, nor that its name was unknown: but Coleridge, J., overruled the objection on the ground that there was no presumption that an illegitimate child had any name, as it could only gain a name by reputation, and that to state that its name was unknown assumed that it had acquired a name; and this decision was held right. (*v*) So where the prisoners were indicted for the murder of 'a certain illegitimate male child, then lately before born of the body of' one of them, it was held right; for it was the case of a party who had never acquired a name, and the indictment identified the party by shewing the name of the parent. (*w*) A bastard must not be described by his mother's name till he has gained that name by reputation. Frances Clark was indicted for the murder of George Lakeman Clark, a base-born infant male child, aged three weeks. The child was hers, and had been christened George Lakeman, the father's name. The murder was proved, but there was no evidence that the child had ever been called Clark; and, on a case reserved, the judges held that, as it had not obtained the mother's name by reputation, it was improperly called Clark in

(*p*) 2 Hale, 237; *R. v. Norton*, R. & R. 510. *R. v. Williams*, 7 C. & P. 298, Williams, J., and Alderson, B. *R. v. Berriman*, 5 C. & P. 601, Parke, J.

(*q*) 2 Inst. 666.

(*r*) 19 St. Tr. 1177. In *R. v. Brinklett*, 3 C. & P. 416, an indictment for manslaughter described the deceased as Henry Sandford, Baron Mount Sandford, of, &c., in Ireland; and it was proved that his Christian name was Henry, his surname Sandford, and his title Baron Mount Sandford, and it was

held by Vaughan, J., that this was no variance.

(*s*) *R. v. Pitts*, 8 C. & P. 771, Erskine, J.

(*t*) 1 East, P. C. c. 5, s. 114, p. 345.

(*u*) *R. v. Biss*, 2 Moo. C. C. R. 93; 8 C. & P. 773. *R. v. Hicks*, 2 M. & Rob. 302, S. P.

(*v*) *R. v. Willis*, 1 Den. C. C. 80; 1 C. & K. 722.

(*w*) *R. v. Hogg*, 2 M. & Rob. 380, Lord Denman, C. J.

the indictment; and that as there was nothing but the name to identify it in the indictment, the conviction could not be supported. (x) Upon an indictment for the murder of 'a certain female child whose name to the jurors was unknown,' it appeared that the child had not been baptised, but the prisoner had said she should like it to be called 'Mary Ann,' and had called it 'her Mary Ann' at one time, and 'Little Mary' at another; the father was a Baptist, and the child was a bastard, and twelve days old: and, upon a case reserved, it was held that the child had not gained a name by reputation, and therefore the indictment was good. (y) And where an illegitimate child, three weeks old, had been baptised by the name of 'Eliza,' but no surname was mentioned at the time of baptism, and neither the register, nor any copy of it, was produced at the trial, and an indictment for murder described her as 'Eliza Waters,' Waters being the name of her mother; it was held, upon a case reserved, that the child had not acquired the name of Waters by reputation, and that the conviction was wrong. (z) Where, however, an indictment charged the murder of Emma Evans, and it appeared that the deceased was an illegitimate child born in a workhouse, and baptised on the 9th of September by the name of Emma, and drowned on the 11th of the same month, when about six weeks old, and that up to the time of the baptism she was not called by any name, but that from the 9th to the 11th of September she was called Emma Evans, Evans being the mother's name, it was held that there was sufficient evidence of reputation for the consideration of the jury, and that this case was distinguishable from the last, because there was no evidence there that the child was ever called Waters at all. (a) Where one count described the child murdered as Lewis Drake; another as Lewis Tavern, and a third as a certain bastard male child called Lewis; the prisoner was the mother of the child, and sometimes called it Lewis, and by that name alone it had been baptised. It had been put out to nurse by its mother, who then went by the name of Tavern; the nurse used to call it Lewis, and when she learnt the mother's name was Drake, she called it Lewis Drake when speaking of it to other persons. The child was about two years old. There was no proof that the prisoner was married, and her brother had never heard of her marriage; but she had been absent from him thirteen years. It was held that there was no evidence of the child being Lewis Tavern; but that the case must go to the jury as to the two other names. As to the name of Lewis, the child went by that name and was baptised by it; and it was for the jury to say whether, from the evidence they were not satisfied that the prisoner was never married; she went by her maiden name of Drake; she pleaded to that name in the indictment, and was there described as a single woman, and her brother never heard of her marriage. Whether all this might not satisfy the jury that the child was a bastard, it was for them to decide, but undoubtedly there was evidence for them to con-

(x) *R. v. Clark*, East. T. 1818. MS. Bayley, J., and R. & R. 358.

(y) *R. v. Smith*, R. & M. C. C. R. 402; 6 C. & P. 151, S. C.

(z) *R. v. Waters*, R. & M. C. C. R. 457; 7 C. & P. 250.

(a) *R. v. Evans*, 8 C. & P. 765. Erskine and Patteson, JJ. See *R. v. Sheen*, 2 C. & P. 639.



sider. (b) The prisoner was indicted for the murder of her infant child, which was described in one count as Harriet Stroud, and in another as a female infant of tender age, whose name is to the jurors unknown. The prisoner, a single woman, gave birth to the child on the 16th of June, and it was called Harriet, and was baptised by that name on the 16th of July; no copy of the register was given in evidence; but it was said that the child was baptised by the name of Harriet, and not Harriet Stroud, and there was no evidence that she had ever been called by any name except Harriet; and the description was held wrong; the proper description would have been Harriet, the base-born child of the prisoner. The want of description is only excused where the name cannot be known. (c) Where an indictment for murder described the deceased as a certain infant female child not named, it was held sufficient; for though 'not baptised' would not have been enough, 'not named,' which means that she had acquired no name, by baptism or usage, was quite sufficient. (d) Where the prisoner was indicted for killing William Scarborough, and he was the illegitimate son of the prisoner, and four years of age, and generally called 'William,' or 'Coley,' after his reputed father; but frequently spoken of as 'Sarah Scarborough's child,' and sometimes, his aunt said, she might have heard him called 'William Scarborough;' it was held that there was some evidence to go to the jury that the deceased, being Sarah Scarborough's bastard, and being frequently and generally addressed as William, had also acquired by reputation the name of William Scarborough; and a party may acquire more names than one by reputation, and he may be indifferently described by either in an indictment. (e)

Where there was no evidence of the name of the deceased as stated in two counts, and the third count described her as 'a certain woman whose name is to the jurors unknown,' and it appeared that the prisoner had asked for lodgings in Oxford 'for himself and his wife,' and the prisoner came with the deceased to the lodgings and they lived there as husband and wife for three or four days, and when taken up by the marshal the prisoner was asked if he had a wife in Oxford, and he said he had; but on the marshal's saying that she was dead, the prisoner replied 'she is not my wife, she is a woman I have been travelling with for the last eight months.' Erskine, J., held, that if the jury were satisfied that she was not the wife of the prisoner, and that the name could not be ascertained by any reasonable diligence, the description was right; but if the jury should think that she was the prisoner's wife, the description was wrong, for she ought then to have been described by the surname of the prisoner. (f)

In other respects great particularity was required formerly in an indictment for murder. It was necessary to allege the manner of the death and the means by which it was caused, and many other

(b) *R. v. Drake*, 4 Cox, C. C. 333, Patten and Talfourd, J.J.

(c) *R. v. Stroud*, 2 M. C. C. 270; 1 C. & K. 187.

(d) *R. v. Waters*, 1 Den. C. C. 356; 2 C. & K. 864.

(e) *R. v. Scarborough*, 3 Cox, C. C. 72, Coltman, J. It is said in the marginal note that the deceased had been called William Scarborough in his mother's presence.

(f) *R. v. Campbell*, 1 C. & K. 82.

particulars; but this led to so many acquittals wholly beside the merits of the case, that a simple form of indictment was rendered sufficient by the 14 & 15 Vict. c. 100, s. 4, which was repealed by the 24 & 25 Vict. c. 95; but by the 24 & 25 Vict. c. 100, s. 6, 'In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed.' (g)

There can be no doubt that, where several join in a murder, both the principal in the first and the principal in the second degree may be charged that they feloniously, wilfully, and of their malice aforethought murdered the deceased; and thus the difficulties which arose in first charging the principal in the first degree, and then alleging that the principal in the second degree was present aiding and assisting, may be avoided. And as the 24 & 25 Vict. c. 94, s. 1, (h) has made accessories before the fact liable to be indicted as principals, it is equally clear that an indictment may charge an accessory before the fact and a principal in the same manner in which we have stated that two principals may be charged. And there is this great advantage in adopting each of these courses; that on such an indictment it is quite immaterial which of the prisoners was principal in the first degree in the one case, or whether the party were accessory before the fact or a principal in the other case, and consequently the jury will be relieved from considering these questions. (i)

This clause has made it quite unnecessary to retain in this chapter many cases which were decided on the allegations in the indictments which are rendered unnecessary by it, as well as on the questions which had arisen whether those allegations were supported by the evidence.

This clause has also got rid of the difficulty of proving what the cause of death was, as it is clear that, if the jury are satisfied that

(g) This clause is taken from the 14 & 15 Vict. c. 100, s. 4, which applied only to indictments for murder and manslaughter, and a serious doubt was entertained whether in an indictment against an accessory to murder or manslaughter, where the accessory was charged as an accessory and not as a principal, it might not still be necessary to adopt the old form of indictment, and in order to render that course unnecessary, the new parts of this section were introduced.

The word 'indictment' includes a coroner's inquisition whereby any person is charged with murder or manslaughter, or as an accessory before the fact to either of those offences. *R. v. Ingham*, 10 L. T. 456; 9 Cox, C. C. 508. See *R. v. G. W. Ry. Co.*, 3 Q. B. 333; *R. v. King*, 2 Cox, C. C. 95; 2 Inst. 32, 550; 4 Inst. 271.

(h) Vol. i. p. 180.

(i) See *R. v. Downing*, 1 Den. C. C. 52, *ante*, p. 143.

the deceased was killed by any means, that is sufficient, although it may be impossible to prove what those means were.

Where an inquisition, after correctly charging the principal in the first degree, alleged that the two other prisoners, at the time of the felony aforesaid ' (to wit) on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, were feloniously present, then and there abetting, aiding, and assisting the said N.,' &c., it was objected that the word 'feloniously' only applied to 'present,' and not to 'abetting, aiding, and assisting;' and it was held that the inquisition was bad on this ground. (j) And where an indictment for murder, after correctly charging the principal in the first degree, proceeded to allege that 'at the time, of the felony and murder was committed (to wit)' &c., precisely in the same terms as in the preceding case, and, upon demurrer, it was objected that the indictment was bad, and that case was relied upon as in point; Coltman, J., said, that it was a grave authority in support of the objection, but he would reserve the point, as the case was so serious a one: it was further objected that the bad English made the averment insufficient, but Coltman, J., was inclined to think that the word 'was' might be rejected, he however would reserve this point also. (k)

It was always necessary to state, that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*, (l) which, as we have already seen, is the great characteristic of the crime of murder; (m) and it must also be stated, that the prisoner *murdered* the deceased. (n) If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, &c., or *killed*, or *slew* the deceased, the conviction can only be for manslaughter. (o)

Where the grand jury return the bill of indictment only a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the usual course to strike out, in the presence of the grand jury, the words 'maliciously' and 'of malice aforethought,' and 'murder,' and to leave only so much as makes the bill to be one for manslaughter; (p) and this appears to be the practice at the present time upon some of the circuits: (q) but it has been thought to be the safer way to present a new bill to the grand jury for manslaughter. (r) And a learned judge has ordered this to be done where the grand jury have returned manslaughter upon a bill for murder, saying he thought it the better course to prefer a new bill, although the usual course on the circuit had been to alter the bill

(j) *R. v. Nicholas*, 7 C. & P. 538, Little-dale and Patteson, JJ.

(k) *R. v. Phelps*, C. & M. 180, and MSS. C. S. G. The principals in the second degree were acquitted, so it became unnecessary to serve the points. C. S. G.

(l) 2 Hale, 186, 187. Staund. P. C. 130. *Bradley v. Banks*, Yelv. 205.

(m) *Ante*, p. 1, *et seq.*

(n) 2 Hawk. P. C. c. 23, s. 77. Anon. Dy. 304.

(o) 1 East, P. C. c. 5, s. 116, pp. 345, 346. 2 Hale, 186.

(p) 2 Hale, 162.

(q) *Ex relat.* Mr. Pugh, Clerk of Assize on the Oxford circuit, 1816.

(r) By Lord Hale, (2 Hale, 162,) on the ground that the words of the endorsement do not make the indictment, but only evidence the assent or dissent of the grand jury, and that the bill itself is the indictment when affirmed. See *R. v. Ford*, Yelv. 99.

for murder, on the finding of the grand jury. (*s*) Though the same indictment may charge one with murder and another with manslaughter, yet if it charge both with murder, the grand jury cannot find it a true bill against one, and manslaughter as to the other; but a finding against one for murder will be good, and there ought to be a new bill against the other for manslaughter. (*t*) And where the grand jury returned a true bill for murder against one, and for manslaughter against another, the one was tried for murder on that indictment; but a new bill for manslaughter was preferred against the other. (*u*)

If, as is very commonly the case, there be an indictment for murder, and a coroner's inquisition for the same offence against the same person, at the same sessions of gaol delivery, the usual practice appears to be to arraign and try the prisoner upon both, in order to avoid the plea of *autrefois acquit* or *attaint*; and to endorse his acquittal or attainder upon both presentments. (*v*)

And where the coroner's jury have found a verdict of manslaughter, and the grand jury a bill for murder, the prisoner has been arraigned and tried on both the inquisition and indictment at the same time. (*w*) So where the grand jury have found a bill for manslaughter, and the coroner's jury a verdict of wilful murder. (*x*) So where the grand jury have found a bill against more prisoners for murder than the coroner's jury. (*y*)

The evidence, in cases of murder, will consist of the proof of the particular facts and circumstances which shew the killing, and that it was committed by the party accused of malice aforethought. It should be observed, however, that when the fact of killing is proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily shewn by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to have been founded in malice until the contrary appears. (*z*)

It has been considered a rule, that no person should be convicted of murder unless the body of the deceased has been found; and a very great judge says, 'I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body be found dead.' (*a*) But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to shew the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck,

(*s*) Turner's case, 1 Lew. 176, Parke, B., at Carlisle.

(*t*) 1 East, P. C. c. 5, s. 116, p. 347.

(*u*) R. v. Bubb, 4 Cox, 455, *ante*, p. 17, after consultation between Williams, J., Lord Campbell, C. J., and the Editor. See R. v. Cary, 3 Bulst. 206. 1 Roll. R. 407, as R. v. Carew. C. S. G.

(*v*) 1 East, P. C. c. 5, s. 134, p. 371.

(*w*) R. v. Walters, Hereford Sum. Ass. 1841, Coltman, J. MSS. C. S. G. R. v.

Powell, Hereford Sum. Ass. Erskine, J., MSS. C. S. G.

(*x*) R. v. Smith, 8 C. & P. 160. Bosanquet and Coltman, JJ., and Bolland, B.

(*y*) R. v. Dwyers, Glouc. Sum. Ass. 1842, Erskine, J., MSS. C. S. G.

(*z*) Fost. 255. *Ante*, p. 18.

(*a*) 2 Hale, 290. Lord Hale only laid this down as a caution; not as a rule in every case, per Maule, J., in R. v. Burton, Dears. C. C. 282.

and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the Court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and (the conviction being unanimously approved of by the judges) was afterwards executed. (b) <sup>1</sup>

And where the mate of a ship was seen to seize the captain from behind, and throw him into the sea, and the captain fell striking a boat, and leaving marks of blood upon it, but was never seen again, Archibald, J., allowed the case to go to the jury, and the prisoner was convicted of manslaughter. (bb)

But where upon an indictment against the prisoner for the murder of her bastard child, it appeared that she was seen, with the child in her arms, on the road from the place where she had been at service to the place where her father lived, about six in the evening, and between eight and nine she arrived at her father's, without the child, and the body of a child was found in a tide-river, near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to shew that it was not the body of such child; it was held that she was entitled to be acquitted; the evidence rendered it probable that the child found was not the child of the prisoner; and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to shew that her child was actually dead. (c)

A question has sometimes been raised whether a prisoner can be convicted of murder where it is impossible for any evidence to be given of the cause of death, in consequence of the state in which the

(b) *R. v. Hindmarsh*, 2 Leach, 569. It was urged on the prisoner's behalf at the trial by Garrow (afterwards Garrow, B.) that he was entitled to be acquitted, on the ground that it was not proved that the captain was dead; and that as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was that he was taken up by some of them, and was then alive. And the learned counsel mentioned a remarkable case which had happened before Gould, J. The mother and reputed father of a bastard child were observed to take the child to the margin of the dock at Liverpool, and after stripping it,

cast it into the dock. The body of the infant was not afterwards seen; and, as the tide of the sea flowed and reflowed into and out of the dock, the learned judge, upon the trial of the father and mother for the murder of their child, observed that it was possible the tide might have carried out the living infant; and upon this ground the jury, by his direction, acquitted the prisoners. But *qu.* the form of the indictment in this case.

(bb) *R. v. Armstrong*, 13 Cox, C. C. 184.

(c) *R. v. Hopkins*, 8 C. & P. 591. Lord Abinger, C. B. *R. v. Cheverton*, 2 F. & F. 833. Erle, C. J., S. P.

#### AMERICAN NOTE.

<sup>1</sup> In America, it has been held not necessary to a conviction for murder that the body be found. *U. S. v. Glibert*, 2 Sumn. 19. *Stocking v. S.*, 7 Ind. 326. But in such a

case a prisoner would not be convicted on his own confession. *S. v. Cardelli*, 19 Nev. 319. *U. S. v. Williams*, 1 Cliff. C. C. 5.

body was found, but it would seem that it is a question for the jury, taking all the circumstances into consideration, whether the death was caused by violence or not, and whether that violence was the act of the prisoner. (cc)

On a trial for murder, in order to prove the state of the health of the deceased prior to the day of his death, a witness was asked in what state of health the deceased seemed to be when he last saw him, and he began to state a conversation which had then taken place between the deceased and himself on this subject; and Alderson, B., held that what the deceased said to the witness was reasonable evidence to prove his state of health at the time. (d)

Upon an indictment for murder by the explosion of certain grenades, a novel kind of explosive instrument, evidence of other deaths and wounds caused by the explosion at the same time and place is admissible for the purpose of proving the character of the grenades. (e) Where in the same case a witness was called to prove that he made the grenades, it was held that the name of the person who gave the order for them might be proved, as a fact in the transaction, even though he had not then been shewn to be connected with the prisoner. (f)

It has already been shewn that if A. be indicted as having given the mortal stroke, and B. and C. as present aiding and assisting, and upon the evidence it appeared that B. gave the stroke, and A. and C. were aiding and assisting, or it be not proved which gave the stroke, the charge is proved, for in law it is the stroke of all. (g) So if a prisoner be indicted for strangling the deceased with her own hands, and upon the evidence it turns out that the deceased was strangled by some one else in the presence of the prisoner, who was privy to it, and so near as to be able to assist, that is sufficient. (h)

An indictment for murder, stating that the prisoner gave and administered poison, is supported by proof that the prisoner gave the poison to A. to administer as a medicine to the deceased, and that A. neglecting to do so, it was accidentally given to the deceased by a child, the prisoner's intention to murder continuing. Upon an indictment for murder, which alleged that the prisoner feloniously, &c., did administer a large quantity of laudanum to a child, it appeared that the prisoner delivered to one S. Stephens, with whom the child was at nurse, about an ounce of laudanum, telling her that it was proper medicine for the child, and directing her to administer to the child every night a tea-spoonful thereof, which was quite a sufficient quantity to kill the child; the prisoner's intention in so doing, as shewn by the finding of the jury, was to kill the child. Stephens took home the laudanum, and thinking the child did not require medicine, did not intend to administer it all, and left it on the mantel-piece of her room. A few days afterwards a little boy of

(cc) Per Kennedy, J., *R. v. Macrae*, Northampton Winter Assizes, Dec. 23, 1892.

(d) *R. v. Johnson*, 2 C. & K. 354.

(e) *R. v. Bernard*, 1 F. & F. 240. But surely the evidence was admissible as proof of what the single act of the principals effected, just as in a case of arson, if one rick

is set fire to and several others burnt, evidence of all is always admitted.

(f) *Ibid.*

(g) *Ante*, p. 142, 1 Hale, 462.

(h) *R. v. Culkin*, 5 C. & P. 121. J. A. Park, J., Parke and Bolland, BB.

the said S. Stephens, during her accidental absence, removed the laudanum from its place and administered a much larger dose than a tea-spoonful to the child, in consequence of which the child died. The jury were directed that if the prisoner delivered the laudanum to Stephens, with intent that she should administer it to the child, and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that, if the laudanum was afterwards administered by an unconscious agent, while the prisoner's original intention continued, the death of the child, under such circumstances, was murder by the prisoner, and that if the tea-spoonful was sufficient to produce death, the administration of a much larger quantity by the little boy would make no difference. The jury found the prisoner guilty, and, upon a case reserved for the opinion of the judges, whether the facts above stated constituted an administering of the poison by the prisoner to the child, they were unanimously of opinion, that the administering of the poison by the child was, under the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had actually administered it with her own hand. (i)

Upon an indictment, alleging that the prisoner did an act which caused the death, it is sufficient to prove that the prisoner caused and procured the act to be done by an innocent agent. An indictment charged that the prisoner, a certain plaster made by the prisoner of certain dangerous ingredients feloniously did place and fix upon the head of the deceased: the prisoner was proved to have applied two plasters over the head of the deceased, but a third, which was applied last before the deceased died, was applied by the child's mother, in the absence of the prisoner, it being made with materials, which had been given by the prisoner to the mother for that purpose; it was objected that the indictment was not proved; but it was held that, though indictments often go on to say, that the prisoner 'caused and procured' the thing to be done, yet if the plaster was made by the direction of the prisoner, that was enough. (j)

There is one important species of evidences occasionally resorted to in cases of homicide, namely, the dying declarations of the party killed, which will be considered in a future part of this Treatise. (k)

The jury may, upon an indictment for murder, find the prisoner guilty of the offence charged, or of the lesser offences of manslaughter or excusable homicide: (l) or of an attempt to commit the murder by the 14 & 15 Vict. c. 100, s. 9. Where, however, the facts of the case amount only to excusable homicide, it is usual for the judge, at the present day, to permit or direct a general verdict of acquittal, unless some considerable blame appears to attach to the

(i) *R. v. Michael*, 2 Moo. C. C. R. 120; S. C. 9 C. & P. 356. 'If A. gives poison to B., intending to poison him, and B., ignorant of it, gives it to C., a child, or other near relation of A., against whom he never meant harm, and C. takes it and dies, this is murder in A., and a poisoning by him. Plowd. Com. 474 a., Dalt. cap. 93, but B.,

because ignorant, is not guilty.' 1 Hale, 431.

(j) *R. v. Spiller*, 5 C. & P. 333. Bolland, B., and Bosanquet, J.

(k) *Post, Evidence.*

(l) 1 Hale, 449. 2 Hale, 302. Co. Lit. 282 a.

conduct of the party. (*m*) And several persons present at a homicide may be found guilty in different degrees, one of murder, the other only of manslaughter. (*n*)

In every case where the point turns upon the question, whether the homicide was committed wilfully and maliciously, or under justifying, excusing, or alleviating circumstances, the matter of fact, namely, whether the facts alleged by way of justification, excuse, or alleviation, are true, is the proper and only province of the jury. But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the Court; for the construction which the law puts upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the Court. (*p*) In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a *special verdict*. But where the law is clear, the jury, under the direction of the Court in point of law, matters of fact being still left to their determination, may, and if they are well advised, always will, find a general verdict, conformably to such direction. (*q*) On a trial for murder, if the jury cannot agree, the presiding judge may discharge them and the prisoner may be tried again. (*r*)

### SEC. XIII.

#### *Jury Power to find Person guilty of concealing Birth on Indictment for Murder of a Child.*

**Concealment of birth.** — The 43 Geo. 3, c. 58, which repealed the 21 Jac. 1, c. 27, and the Irish Act 6 Anne, provided that the trials, in England and Ireland, of women charged with the murder of any issue of their bodies, which would by law be bastard, should proceed by the like rules of evidence and presumption as were allowed to take place in respect to other trials for murder; and that the jury, by whose verdict any prisoner charged with such murder as aforesaid should be acquitted, might find, 'that the prisoner was delivered of issue of her body, male or female, which, if born alive, would have been bastard; and that she did, by secret burying, or otherwise, endeavour to conceal the birth thereof.'

This provision, as it could only be acted upon where the child was a bastard and where the party was charged with murder by an inquisition or an indictment, (*s*) was open to much objection, and

(*m*) *Post*, chap. on *Excusable Homicide*.  
Fost. 279, 289.

(*n*) See *ante*, p. 67.

(*p*) See *R. v. Fisher*, 8 C. & P. 182.

(*q*) Fost. 255, 256. See *R. v. Smith*, *ante*, p. 132, where the Court refused to receive a verdict. And see *Slaughterford's case*, cited Str. 855.

(*r*) *Winsor v. R.*, 35 L. J. M. C. 121, see vol. i. p. 52.

(*s*) This statute did not make the con-

cealment an offence for which an indictment could be preferred. *R. v. Parkinson*, Carlisle Sum. Ass. 1821. MS. Bayley, J. The 49 Geo. 3, c. 14, which repeals the Scotch Act of Parliament, relating to the murder of bastard children, differs from the 43 Geo. 3, c. 58, and does not make the concealment a matter which can only be found by the jury upon the trial of an indictment for murder, but enacts (sec. 2) 'that if any woman in Scotland shall conceal her being with child



has been repealed by the 9 Geo. 4, c. 31; and that Act by the 24 & 25 Vict. c. 95.

By the 24 & 25 Vict. c. 100, s. 60, 'If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth.' (t)

Cases had not unfrequently occurred where endeavours had been made to conceal the birth of children, and there was no evidence to prove that the mother participated in those endeavours, though there was sufficient evidence that others did so, and under the former enactments, under such circumstances, all must have been acquitted. (u) The present clause is so framed as to include every person who uses any such endeavour; and it is quite immaterial under it whether there be any evidence against the mother or not.

Under the former enactments a person assisting the mother in concealing a birth would only have been indictable as an aider or abettor; but a person so assisting would come within the terms of this clause as a principal.

Under the former enactments the mother alone could be convicted of this offence where she was tried for the murder of her child. Under this clause any person tried for the murder of a child may be convicted of this offence, whether the mother be convicted or not.

**Secret disposition.**—The prisoner put the dead body of her child over a wall which was four and a half feet high, and divided a yard from a field. The yard was at the back of a public-house, and entered from the street by a narrow passage. The prisoner did not live at the public-house, and must have carried the body from the street up the passage to the yard. The field was grazed by the cattle of a butcher, and the only entrance to it was through a gate leading from the butcher's own yard. There was no path through the field, and a person in the field could only see the body in case they went up to the wall, close against which the body lay. A little girl, picking flowers in the field, found the body of the child, twenty

during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be missing, the mother, being lawfully convicted thereof, shall be imprisoned for a period not exceeding two years, in such common gaol or prison as the Court

before which she is tried shall direct and appoint.'

(t) This clause is framed from the 9 Geo. 4, c. 31, s. 14; and 10 Geo. 4, c. 34, s. 17 (1).

(u) *R. v. Waterage*, 1 Cox, C. C. 338. *R. v. Skelton*, 3 C. & K. 119.

yards from the gate. There was nothing on or over the body to conceal it:—Held, upon the 24 & 25 Vict. c. 100, s. 60, that there was evidence to go to the jury of a secret disposition of the dead body of the child, and a conviction for endeavouring to conceal the birth of the child, by secretly disposing of its dead body, was confirmed. (*w*)

Leaving the dead body of a child in two boxes, closed, but not locked or fastened, one being placed inside the other in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body. (*x*)

A woman delivered of a child born alive endeavoured to conceal the birth thereof, by depositing the child while alive in the corner of a field, leaving the infant to die from exposure, which it did, and the dead body was afterwards found in the corner:—Held, that she could not be convicted of concealing the birth of the child. (*y*)

Where on an indictment for endeavouring to conceal the birth of her child, it was proved that, the prisoner appearing ill, her mistress sent for a doctor, who asked the prisoner if she had been confined, and she said she had been; and the doctor asked her what she had done with the child, and she said it was in a box in her bed-room, and he went to the room and found the child in an open box, having the cover lifted; Byles, J., told the jury that ‘there must be a secret disposition for the purpose of concealing the birth. The concealment must be by a secret disposition of the body, and a disposition could only be secret by placing it where it was not likely to be found. Secrecy was the essence of the offence. Could they say that an open box in the prisoner’s bed-room was a secret disposition? It was for them to say, but in his opinion it was not.’ (*z*)

Under the repealed statute of 21 Jac. 1, evidence was always allowed of the mother’s having made provision for the birth, as a circumstance to shew that she did not intend to conceal the death. (*a*) So, in a case after the 9 Geo. 4, c. 31 (now repealed), where the body of a child was found among the feathers of a bed, but it did not appear by whom it had been placed there, and the prisoner had prepared clothes for the child, and sent for a surgeon at the time of her confinement, an acquittal was directed. (*b*)

The prisoner and one Diana Thompson were indicted for the murder of the prisoner’s bastard child; it was a seven months’ child, and from the state in which it was found the probability was

(*w*) *R. v. Brown*, 39 L. J. M. C. 94, L. R. J. C. C. R. 244, et per Bovill, C. J. ‘The first point is whether there was any evidence of a secret disposition within the statute. That is a question which depends upon the circumstances of each particular case. The most public exposure may be a secret disposition, as, for instance, in the middle of Dartmoor, or on the top of a mountain in Scotland in winter. It is for the jury to consider.’ There was here abundant evidence of a secret disposition.

(*x*) *R. v. George*, 11 Cox, C. C. 41. Bovill, C. J.

(*y*) *R. v. May*, 10 Cox, C. C. 448.

(*z*) *R. v. Sleep*, 9 Cox, C. C. 559. But Martin, B., held that it was a question of law for the judge, whether there has been a secret disposition of the body, i. e., a disposing of it in such a place as that the offence may have been committed. See *R. v. Clarke*, 4 F. & F. 1040.

(*a*) 1 East, P. C. c. 5, s. 15, pp. 228–229.

(*b*) *R. v. Higley*, 4 C. & P. 366, J. A. Park, J. See *R. v. Douglas*, R. & M. 480; 7 C. & P. 644.

that it was stillborn. Thompson, when questioned immediately after the child's birth, wholly denied it, though she must have known it. The prisoner threw the child down the privy; and the jury found this an endeavour to conceal the birth; and on a case reserved, the judges were unanimous that this was evidence of an endeavour to conceal the birth. (*c*)

The sending for a female to attend at the beginning of the labour, and the fact of its being known to the mother of the woman and others that she was pregnant, were no bar to a conviction for concealing the birth, under the repealed Act 9 Geo. 4, c. 31, s. 14, but only evidence for the consideration of the jury. If the dead body of the child were buried, or otherwise disposed of by an accomplice of the mother in her absence, the accomplice acting as her agent in so doing, she might be convicted under the last-mentioned Act of endeavouring to conceal the birth. (*d*)

The prisoner was found going across a yard in the direction towards a privy with a bundle of cloth sewed up, with the body of a child in it, and was stopped; Gurney, B., interposed, and said, that the prisoner could not be convicted under the last-mentioned Act, the offence not being complete; 'the body must be buried or otherwise disposed of, to bring the case within the Act. Here she was interrupted in the act, probably, of disposing of the body, but the act was incomplete.' (*e*)

It seems that any concealment of the body, whether intended to be final or temporary, was within this Act. (*f*) In order to avoid all such questions in future, the words 'any secret disposition of the dead body,' were substituted for the words of the 9 Geo. 4, c. 31, s. 14, 'secret burying or otherwise disposing of the dead body;' and consequently the only question upon the present enactment is, whether there was any secret disposition whatever of the dead body, and it is perfectly immaterial whether that disposition be temporary or permanent.

Where on an indictment under the repealed Act 9 Geo. 4, c. 31, for endeavouring to conceal the birth of a child, it appeared that the prisoner was delivered in a privy; that the child dropped from her there into the soil, and that there she left it, and the jury thought that she went to the privy for the purpose of being delivered there, and for the purpose thereby of concealing the birth; upon a case reserved, the judges thought, upon the wording of the Act, it was necessary something should be done by the prisoner after the birth to bring the case within the Act 9 Geo. 4, c. 31, s. 14. (*g*) So in a similar case, where the prisoner had denied her pregnancy and the birth, and the body of the child was found in a privy; Patteson, J., told the jury that the offence was not merely the endeavouring to conceal the birth of a child, but the prisoner, to come within the

(*c*) *R. v. Cornwall*, MS. Bayley, J., and R. & R. 336. This case was decided under the repealed Act 43 Geo. 3, c. 58.

(*d*) *R. v. Bird*, 2 C. & K. 817.

(*e*) *R. v. Snell*, 4 Moo. & R. 44. *R. v. Waterage*, 1 Cox, C. C. 338. S. P.

(*f*) *R. v. Farnham*, 1 Cox, C. C. 349. *R. v. Goldthorpe*, 2 M. C. C. R. 244. C. &

M. 335. *R. v. Perry*, Dears. C. C. 471, Pollock, C. B., *diss. R. v. Gogarty*, 7 Cox, C. C. 107, but in *R. v. Opie*, 8 Cox, C. C. 332, Martin, B., agreed with Pollock, C. B., in dissenting from *R. v. Perry*.

(*g*) *R. v. Wilkinson*, M. T. 1829. MSS. Bayley, J., 3 Burn, J., D. & W. 348.

meaning of the Act (9 Geo. 4, c. 31), must have endeavoured to conceal the birth by secret burying, or otherwise disposing of the dead body of the child; and it was essential to the commission of this offence that she should have done some act of disposal of the body after the child was dead. If she had gone to the privy for another purpose, and the child came from her unawares, and fell into the soil and was suffocated, she must be acquitted, notwithstanding her denial of the birth of the child, because she did not come within the provisions of the Act, unless she had done something with the child after it was dead. If there had been evidence that the child was born elsewhere, and was, after it was dead, carried by her to this place, and thrown in, that would be a disposing of the body within the Act. (h) It was a question for the jury in such a case whether the prisoner threw the dead body into the privy, or whether it fell from her into it. (i)

On an indictment for murder it appeared that the child was discovered in an outhouse, alive, but concealed from view by four bundles of rick-pegs lying horizontally in front and partly over it, but not touching it: the child was left as it was found, and about an hour afterwards the rick-pegs were found to have been partially removed, and placed on one side of the child, which was dead, and there was evidence to shew that the prisoner alone had been in the outhouse during the hour. For the prosecution it was urged that if the prisoner after the death of the child re-covered it, that would be a secret disposal of the body. Lord Campbell, C. J., 'I have carefully examined the statute (9 Geo. 4, c. 31), and the facts with reference to the point suggested by the counsel for the prosecution. Any objection that might have arisen, that there was no attempt to conceal the dead body of the child, is, I think, removed in the manner suggested; for there cannot be any reasonable doubt that the prisoner visited the outhouse after the child was dead, and although she did not remove it, any replacing of the clothes or other things by which the body was concealed from view, would, I think, be an endeavour to conceal by a secret disposal of the dead body within the statute.' (j)

But where the dead body was found on the floor of an attic, wrapped in bed-sheets which had been removed from the room below; the head of the child separated from the body, and a knife lying near it, and the body was in the middle of the room, Talfourd, J., held that there was no evidence of an endeavour to conceal. (l)

Where, on an indictment for murder, it appeared that the prisoner had denied that she was in the family way; but in consequence of a stain of blood having been discovered in her bed-room she was questioned, and then said that she had taken the child away, and put it in a sheet of water in a park, and she accompanied the con-

(h) *R. v. Turner*, 8 C. & P. 755. Patteson, J. And where the evidence strongly tended to shew that the child had been born in a privy, and there was no evidence to shew any act done to it by the prisoner after its death, Coleridge, J., approved of the preceding case, and the counsel for the prosecution offered no evidence, as the case could not be

distinguished from *R. v. Turner*. *R. v. Nash*, Hereford Spr. Ass. 1841. MSS. C. S. G. *R. v. Derham*, 1 Cox, C. C. 56, S. P., per Coleridge, J.

(i) *R. v. Coxhead*, 1 C. & K. 623, Platt, B.

(j) *R. v. Hughes*, 4 Cox, C. C. 447. *Sed quare*.

(l) *R. v. Goods*, 6 Cox, C. C. 318.

stable thither, and pointed out where she had thrown in the body, and it was found wrapped in a towel and dressed in a cap and shirt; and she afterwards stated that she had put away the body in a box in her room for two days, after which she threw it into the water, and said she should have had it buried in the churchyard, only she was afraid of provoking her father: Coltman, J., told the jury that the offence contemplated by the Act (9 Geo. 4, c. 81), was the endeavour to conceal the birth from the world at large, and not from any individual. The statute did not apply to individuals, but to society in general. If, therefore, the secret disposal of the dead body arose from an endeavour to conceal the birth from some private individual, and not from the world at large, then the offence contemplated by the statute had not been committed; and if the jury believed that the prisoner was really actuated by the dread of provoking her father's displeasure, she was not guilty of this offence. (m)

Where, on an indictment under the repealed Act 9 Geo. 4, c. 81, for concealing the birth, a surgeon stated that the remains were those of a child of which the mother must have gone from seven to nine months; Erle, J., told the jury that 'this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity; and if she had miscarried at a time when the fœtus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins; but it may, perhaps, be safely assumed that, under seven months, the great probability is that the child would not be born alive.' (n)

In a case which arose under the repealed Act of 21 Jac. 1, where it appeared from the view of the child and by apparent probabilities, that it had not arrived at its *debitum partûs tempus*, as it wanted hair and nails, the case was considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances it was left to the jury upon the evidence, as at common law, to say whether the mother was guilty of the death. (o)

The dead body of the child must be found and identified even on an indictment for attempting to conceal the birth. (p)

An indictment for concealing the birth of a child must expressly allege the child to be dead, for it is only an offence to conceal the dead body. (q)

(m) R. v. Morris, 2 Cox, C. C. 489.

(n) R. v. Berriman, 6 Cox, C. C. 388. According to Martin, B., a *fœtus* not bigger than a man's finger, but having the shape of a child, is a child within the statute. R. v. Colmer, 9 Cox, C. C. 506, *sed quære*. In R. v. Hewitt, 4 F. & F. 1101, Smith, J., left it to the jury to say whether what the prisoner

had concealed was a child, or was only a *fœtus*.

(o) 2 Hale, 289.

(p) Per Smith, J., 11 Cox, C. C. 684.

(q) R. v. Ann Davis, Hereford Spr. Ass. 1829. Parke, J. MSS. C. S. G. Perkin's case, 1 Lew. 44, per Parke, J.

An indictment stated that the prisoner endeavoured to conceal the birth of her child 'by secretly disposing of the dead body;' and it was objected that the mode of disposal ought to be stated to enable the Court to see whether it amounted to the complete disposition contemplated by the statute (9 Geo. 4, c. 31); one mode was specified in the Act, and any other ought to be stated; and Maule, J., expressing a strong opinion that the objection was good, the counsel for the prosecution declined to press the case. (r)

An indictment under the repealed Act 9 Geo. 4, c. 31, alleging that the prisoner did cast the dead body of her child into the waters and filth in a privy, and 'did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof,' is sufficient; for the word 'thereby' applies both to the disposal and to the endeavour; and the indictment need not allege that the child died before, at, or after its birth. (s)

Where an indictment for murder was held bad, because it neither named the child nor stated that its name was unknown, it was held that the prisoner could not be convicted of endeavouring to conceal the birth of the child; for the indictment being bad for its professed purpose was bad altogether. (t)

If the prisoner were charged with the murder of her bastard child by the coroner's inquisition, she might have been found guilty, under the 43 Geo. 3, of endeavouring to conceal the birth, for the coroner's inquisition is a charge. (u)

## SEC. XIV.

### *Of Judgment and Execution. (uu)*

The judgment and mode of execution in cases of murder, is now regulated by the 24 & 25 Vict. c. 100, and 31 & 32 Vict. c. 24.

By 24 & 25 Vict. c. 100, s. 1, 'Whosoever shall be convicted of murder shall suffer death as a felon.' (v)

Sec. 2. 'Upon every conviction for murder the Court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act, upon

(r) *R. v. Hounsell*, 2 M. & Rob. 292. But as the present clause has the words 'any secret disposition,' it should seem that an indictment in this form would be good; for every secret disposition is included. See *Holloway v. R.*, 17 Q. B. 317, where it was held that a count for aiding an escape was good, though it did not state the means used, because the words of the 4 Geo. 4, c. 64, s. 43, are, 'shall, by any means whatever, aid.'

(s) *R. v. Coxhead*, 1 C. & K. 623, Platt, B.

(t) *R. v. Hicks*, 2 M. & Rob. 302. Coleridge and Maule, JJ.

(u) *R. v. Maynard*, Mich. T. 1812. MS. Bayley, J., R. & R. 240. *Cole's case*, 3 Campb. 371. 2 Leach, 1095. *Dobson's case*, 1 Lew. 43. *Moylan's case*, ib. 44, and there seems no doubt that the prisoner might be so convicted under the new statute, for the prisoner is 'tried for the murder' as much on the inquisition as on the indictment. C. S. G.

(uu) As to judgment where the prisoner is insane, see vol. i. p. 141.

(v) This clause is taken from the 9 Geo. 4, c. 31, s. 3, and 10 Geo. 4, c. 34, s. 4 (1).

a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon.'

By the 4 Geo. 4, c. 48, s. 1, *ante*, where any person was convicted of any capital felony, except murder, the Court, instead of pronouncing sentence of death, was empowered to order that sentence to be recorded. By the 6 & 7 Will. 4, c. 30, s. 2, which applied both to England and Ireland, it was enacted, that 'sentence of death may be pronounced after convictions for murder in the same manner, and the judge shall have the same power in all respects as after convictions for other capital offences.' In *R. v. Hogg*, (*w*) Lord Denman, C. J., held, that under this clause sentence of death might be recorded on a conviction for murder. By the 7 Will. 4 & 1 Vict. c. 77, s. 3, whenever any offender is convicted before the Central Criminal Court of any crime punishable with death, that Court may direct judgment of death to be recorded. This clause clearly included murder. This clause, so far as it relates to murder, and the 6 & 7 Will. 4, c. 30, s. 2, are repealed by the 24 & 25 Vict. c. 95, and the present clause renders it imperative upon the Court to pass sentence of death on every person convicted of murder; it leaves, however, the time of passing the sentence, and all other proceedings, exactly as they were before this Act passed. (*x*)

By the 31 & 32 Vict. c. 24, (*y*) s. 2, judgment of death to be executed on any prisoner sentenced on any indictment or inquisition for murder, shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution. The Act directs that certain persons shall be present at the execution, &c.

By 24 & 25 Vict. c. 100, s. 3, 'The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the Court shall so direct.' (*z*)

By 31 & 32 Vict. c. 24, s. 6, the body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, provided that if one of Her Majesty's principal Secretaries of State is satisfied on the representation of the visiting justices of a prison that there is not convenient space within the walls thereof for the burial of offenders executed therein, he may, by writing under his hand, appoint some other fit place for that purpose, and the same shall be used accordingly

Where two persons had been convicted of a barbarous murder in Pembrokeshire, at the Hereford assizes, being the next English county, and the indictment had been removed by *certiorari* into the Court of King's Bench, in order to argue some exceptions, which were overruled, that Court decided, after some questions made whether the prisoners ought not to be sent back to Herefordshire to receive sentence, that they had the same jurisdiction over facts committed in Wales, as if committed in the next adjacent county in England; and the prisoners were therefore sentenced in the King's

(*w*) 2 M. & Rob. 380.

(*x*) See further observations on this point, Greaves' Cr. Acts, 30, 2nd edit.

(*y*) This Act, with certain modifications,

applies to Scotland and Ireland, see ss. 13 & 14.

(*z*) This clause is founded on the 2 & 3 Will. 4, c. 75, s. 16, and 4 & 5 Will. 4, c. 26, s. 2.

Bench, and were executed by the marshal. (a) But it seems to have been considered in one case, that sentence pursuant to the statute 25 Geo. 2, c. 37, may be passed by a judge at *nisi prius* upon an indictment for murder removed by *certiorari* at the instance of the Attorney-General into the Court of King's Bench, and afterwards tried at *nisi prius*, without remitting the transcript of the record to the Court of Queen's Bench. (b)

On the application of the Attorney-General, the Court of Queen's Bench will, as a matter of course, grant a *habeas corpus* to bring up prisoners convicted of murder and sentenced to death at the assizes, and a *certiorari* to remove into the Queen's Bench the record of the conviction and judgment. The prisoners were convicted of murder at Chester, and sentenced to be executed the next Friday; but a question arose, whether, since the 11 Geo. 4 & 1 Will. 4, c. 70, ss. 13, 14, and 15, the sheriffs of the city or the sheriff of the county were bound to execute the sentence; and both parties refusing to do it, the prisoners had been from time to time respited. The Attorney-General moved for a *certiorari* to remove the record of the conviction and the judgment, and for a *habeas corpus* to bring up the prisoners, in order that execution might be awarded by the King's Bench, and said he considered himself entitled to the writs as of right: but from respect to the Court, and for his own justification in the course he adopted, he stated the grounds of his application, and cited many cases to shew that he was entitled to the writs as of course, and that the Court of King's Bench might direct execution to be done by the sheriff of the county of Chester, or those of the city, by the sheriff of Middlesex, or by the marshal of the King's Bench; and the writs were forthwith granted by the Court. (c)

When the prisoners were brought up and called upon to state if they had anything to say why execution should not be awarded, one of them prayed three days' time to answer; and the Court, in the exercise of its discretion, granted the application as to both. (d) When the prisoners were brought up again, one of them pleaded *ore tenus*, (e) that the King by proclamation in the 'Gazette' had promised pardon to any person, except the actual murderer, who should give information, whereby such murderer should be apprehended and convicted; and that he, not being the actual murderer, had given such information, and thereby entitled himself to the pardon. The Attorney-General demurred to the plea *ore tenus*, and the Court held that it was bad. (f) The Court in the same case also refused to hear an application from the sheriff of Middlesex, into whose custody the prisoners had been removed, praying that the order to do execution might not be made upon him. (g)

(a) Athos' case (father and son) as cited in note (r), 1 Hale, 464, where it is said that the prisoners were executed at Kennington gallows, near Southwark. In Taylor's case, 5 Burr. 2797, the reporter says that he remembers this case; and that the defendants, being in the custody of the marshal, were executed at St. Thomas a Waterings, near the end of Kent-street. And see also the case in 1 Str. 553, and 8 Mod. 136; and see the Sissinghurst-house case, *ante*, p. 120.

(b) R. v. Thomas, 4 M. & S. 447.

(c) R. v. Garside, 2 Ad. & E. 266. 4 N. & M. 333. See R. v. Antrobus, 2 Ad. & E. 788.

(d) R. v. Garside, *supra*.

(e) As he may do. See Dean's case, 1 Leach, 476.

(f) R. v. Garside, *supra*.

(g) Ibid. The Court, however, awarded execution to be done by the marshal of the Marshalsea, assisted by the sheriff of Surrey.



## CHAPTER THE SECOND.

### OF MANSLAUGHTER.

In this species of homicide, malice, which has been shewn (*a*) to be the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution. (*b*)

In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed. (*c*) It was formerly considered that there could not be any accessories before the fact in any case of manslaughter, because it was presumed to be altogether sudden, and without premeditation. (*d*) And it was laid down, that if the indictment be for murder against A., and that B. and C. were counselling and abetting as accessories before only (and not as *present* aiding and abetting, for such are principals), if A. be found guilty only of manslaughter, and acquitted of murder, the accessories before will be thereby discharged. (*e*) But the position ought to be limited to those cases where the killing is sudden and unpremeditated; for there are cases of manslaughter where there may be accessories. (*f*) Thus a man may be such an accessory by purchasing poison for a pregnant woman to take in order to procure abortion, and which she takes and thereby causes her death. (*g*) Where two men fought with fists and the one was killed, and before fighting by agreement they each deposited a pound with the defendant, upon the terms that after the fight he was to hand over the two pounds to the winner, the defendant, who was not present at the fight, and took no further part in the circumstances attending it than to hold the money and to hand it over afterwards to the survivor, was held not liable to be convicted of being accessory before the fact to the manslaughter. (*h*) There may be accessories after the fact in manslaughter. (*i*)

(*a*) *Ante*, p. 1, *et seq.*

(*b*) Fost. 290. 1 Hale, 466. 'Manslaughter is homicide, not under the influence of malice, but where the blood is heated by provocation, and before it has time to cool.' Per Taunton, J., Taylor's case, 2 Lew. 215.

(*c*) 1 Hale, 438, 439, and see *ante*, p. 141, *et seq.* as to what will be a presence aiding and abetting.

(*d*) 1 Hale, 437. 1 Hawk. P. C. c. 30, s. 2.

(*e*) 1 Hale, 450. This is clearly Bibbith's case, 4 Rep. 43. Moor, 461. See the observations on it, Greaves' Cr. Acts, 43, 2nd edit.

(*f*) R. v. Gaylor, D. & B. C. C. 288.

(*g*) *Ibid.*

(*h*) R. v. Taylor, 44 L. J. M. C. 67, L. R. 2 C. C. R. 147.

(*i*) 1 Hale, 450. 1 East, P. C. c. 5, s. 123, p. 353. R. v. Greenacre, 8 C. & P. 35. Tindal, C. J., Coleridge and Coltman, JJ. This seems to have been doubted before the statute 1 Anne, stat. 2, c. 9, s. 1 (2 Hawk. P. C. c. 29, s. 24); but the effect of that statute seems to have removed the doubt. So much of the 1 Anne as relates to accessories is repealed by the 7 Geo. 4, c. 64.

## SEC. I.

*Cases of Provocation.*<sup>1</sup>

Whenever death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity; and the offence will be manslaughter. (*j*) It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him; as the presumption of law deems all homicide to be malicious, until the contrary is proved. (*k*)

We have already seen, *ante*, p. 38, what provocation will free the party killing from the crime of murder and reduce the offence to manslaughter.

## SEC. II.

*Cases of Mutual Combat.*

Instances of mutual combat, in which, from the deliberate conduct of the parties, from some undue advantage taken by the party killing, or from the violent conduct which the party killing pursued in the first instance, the conclusion of malice has been drawn, and the killing has consequently amounted to murder, have been shewn in the preceding chapter. (*l*) We have also considered those cases where, upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side, and have shewn that if death happen under such circumstances, the offence of the party killing will amount only to manslaughter. (*m*)

## SEC. III.

*Cases of Resistance to Officers of Justice; to Persons acting in their Aid; and to Private Persons lawfully interfering to apprehend Felons, or to prevent a Breach of the Peace.*

It has been before mentioned as a general rule, that where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be

(*j*) 1 Hale, 466. 1 Hawk. P. C. c. 30.  
Fost. 290. 4 Blac. Com. 191. 1 East, P. C.  
c. 5, s. 19, p. 232.

(*k*) *Ante*, p. 2.  
(*l*) *Ante*, p. 47, *et seq.*  
(*m*) Fost. 295.

## AMERICAN NOTE.

<sup>1</sup> See *Ex parte Moon*, 30 Ind. 197; *P. v. S.*, 28 Tex. 698; *S. v. Anderson*, 4 Mo. 265; *Sanchez*, 24 Cal. 17; *S. v. Decklots*, 19 *S. v. Massaga*, 65 N. C. 480; *Colton v. S.*, Iowa, 447; *Perry v. S.*, 43 Ala. 21; *Maria v.* 31 Miss. 504; *U. S. v. Mingo*, 2 Curt. C. C. 1.

murder in all who take part in such resistance. (*n*) But this protection of the law is extended only to persons who have proper authority, and who use that authority in a proper manner; (*o*) wherefore questions of nicety and difficulty have frequently arisen upon the points of authority, legality of process, notice, and regularity of proceeding. The consequence of defects in any of these particulars, as we have seen *ante*, is in general that the offence of killing the person resisted, is extenuated to manslaughter.

## SEC. IV.

*Cases where the Killing takes place in the Prosecution of some Criminal, Unlawful, or Wanton Act.*

It has been shewn, that where from an action, unlawful in itself, done deliberately, and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder: (*p*) and it may be here observed, that if such deliberation and mischievous intention does not appear, (which is matter of fact, and to be collected from circumstances,) and the act was done heedlessly and incautiously, it will be manslaughter. (*q*)

Where an injury, intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter. For if a blow, intended against A., and lighting on B., arose from a sudden transport of passion, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it shall have caused the death of B. (*r*)

There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief: and the party committing them, and causing death by such conduct, will be guilty of manslaughter. As if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensues from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter. (*s*) But it is said, that in such a case it would be murder if the rider had intended to divert himself with the fright of the crowd. (*t*) And if a man, knowing that people are passing along the streets, throw a stone or shoot an arrow over a house or wall, and a person be thereby killed, this will be manslaughter, though there were no intention to do hurt to any one, because the act itself was unlawful. (*u*) So where a gentleman came to town in a chaise, and,

(*n*) *Ante*, p. 70.(*o*) Fost. 319.(*p*) *Ante*, p. 121, *et seq.*(*q*) Fost. 261.(*r*) Fost. 262.(*s*) 1 East, P. C. c. 5, s. 18, p. 231.(*t*) 1 Hawk. P. C. c. 31, s. 68.(*u*) 1 Hale, 475. 1 Hawk. P. C. c. 29, s. 9.

before he got out of it, fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and manifestly improper. (v)

A party who causes the death of a child by giving it spirituous liquors, in a quantity quite unfit for its tender age, is guilty of manslaughter. (w)

Where an indictment for manslaughter stated that the three prisoners gave, administered, and delivered to M. A. divers large and excessive quantities of wine and porter, and induced, procured, and persuaded M. A. to take, drink, and swallow the said quantities of spirituous liquors; the same being likely to cause and procure his death, and which the prisoners then and there well knew; and that M. A., by means of the said inducement, procurement, and persuasion took, drank, and swallowed the said large quantities of spirituous liquors; by means whereof he became greatly drunk, &c., and while he was so drunk as aforesaid, the prisoners made an assault on him and forced and compelled him to go, and put, placed, and confined him in a cabriolet, and drove and carried him about therein for a long time, and thereby shook, threw, pulled, and knocked about M. A., by means whereof M. A. became mortally sick; of which said large quantities of spirituous liquors, and of the drunkenness occasioned thereby, and of the said shaking, &c., and the sickness occasioned thereby, M. A. died; it appeared that the deceased was in possession of the goods of one of the prisoners under a warrant from the sheriff, and the three prisoners plied him with drink, themselves drinking freely also, and when he was very drunk, put him into a cabriolet, and caused him to be driven about the streets, and about two hours after he was put in the cabriolet he was found dead. Parke, B., after directing the jury to dismiss from their consideration that part of the indictment which alleged that the prisoners knew that the quantity of liquor taken was likely to cause death, of which there did not appear to be any evidence, and which, if proved, would make the offence approach to murder, told the jury that if they were of opinion that the prisoners put the deceased in the cabriolet, then the questions would be: first, whether they or any of them were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose; or, whether, when he had taken it, they put him into the cabriolet for an unlawful purpose. If they thought that the three prisoners, or one of them, made him excessively drunk, to enable the prisoner, whose goods were seized, to prevent the completion of the execution; or if they were satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact of persons getting together to drink,

(v) *Burton's case*, 1 Str. 481.

(w) *R. v. Martin*, 3 C. & P. 211.<sup>1</sup>

#### AMERICAN NOTE.

<sup>1</sup> And see *Ann v. S.*, 11 Humph. 159, where a slave contrary to orders gave a child laudanum with intent to produce a harmless sleep—held manslaughter; see also *Sarah v. S.*, 28 Missis. 267; 61 Am. D. 544.

or one pressing another to do so, was not an unlawful act; or, if death ensued, an offence that could be construed into manslaughter. Upon the first question stated, it would be essential to make out that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house; and if that were doubtful, still if, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case would be a case of manslaughter. If, however, they all got drunk together, and afterwards he was put into the cabriolet with an intention that he should take a drive only, that was not an unlawful object, such as had been described, and the prisoners would be entitled to an acquittal. And to a question put by the jury, the learned Baron answered, that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. (x)

If death ensues from an act which is a mere trespass the offence will be only manslaughter, not murder.

Where a carman was in the front part of a cart loading it with sacks of potatoes, and a boy pulled the trapstick out of the front of the cart, but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received, it was held that the boy was guilty of manslaughter. (y) So where an indictment for manslaughter alleged that the prisoners in and upon one L. H. did make an assault, and that L. H. then lying in a certain cart containing divers bags of nails of great weight, the prisoners did with their hands force up the shafts of the said cart, and throw down the body of the said cart in which L. H. was so as aforesaid lying, and him the said L. H. by such forcing up of the shafts and throwing down of the body of the said cart as aforesaid, did cast and throw upon the ground under the said bags of nails; by means whereof the said bags of nails were thrown and forced against over and upon the breast of L. H., L. H. then being upon the ground, and the said bags of nails then and there did press and lie upon the breast of L. H., thereby giving, &c., and it was urged that this indictment was bad, as it did not allege that the prisoners knew that the deceased was in the cart; Taunton, J., held that it was not necessary to allege such knowledge, as malice was not an ingredient in the crime. (z)

On an indictment for manslaughter, it appeared that the deceased, having deposited a gun with the prisoner for a loan of money, called at the prisoner's house when he was absent, and took the gun away without repaying the loan. When the prisoner found the gun was gone he went after the deceased, and demanded it back. The deceased refused to comply, and the prisoner thereupon endeavoured to wrest it from him. The deceased said that the gun was loaded;

(x) *R. v. Packard*, C. & M. 236.

(y) *R. v. Sullivan*, 7 C. & P. 641.

(z) *R. v. Lear and Kempson*, Stafford Spring Assizes, 1832. MSS. C. S. G. ney, B., and Williams, J.

the prisoner, however, persisted in his attempt to take it away, and after a violent struggle succeeded in doing so; but, falling on the ground as he was in the act of wrenching the gun away, the gun went off accidentally, and killed the deceased. Lord Campbell, C. J., told the jury that, though the prisoner had a right to the possession of the gun, to take it away from the deceased by force was unlawful; and that, as the discharge of the gun was the result of this unlawful act, it was their duty to find the prisoner guilty of manslaughter. (a)

On an indictment for manslaughter, a statement of the prisoner was proved as follows: 'As I was going home about four o'clock this afternoon I heard the report of a gun. Shortly afterwards I saw the deceased with a gun, and I went to him to take his gun from him. We had a scuffle together for about ten minutes, and there were blows exchanged on both sides; the deceased struck me, and knocked me down with his gun; at the same time the gun went off, and shot the deceased. I was insensible for a short time, and when I came round found the deceased was dead, and had the barrel of the gun in his hand.' The prisoner was a game-keeper of a gentleman who had permission by parol to shoot over the land where this transaction took place. It was contended that, admitting the prisoner had no right to take the gun away, and that he was guilty of an assault in attempting to do so, the death was not the result of that assault, but of the excess of violence of the deceased himself. Lord Campbell, C. J., told the jury that the case was one of manslaughter. The struggle between the prisoner and the deceased was to be considered as one continuous illegal act on the part of the prisoner, and death resulting from that act. (b)

Where a defendant kept a gun loaded with printing types, in consequence of several robberies having been committed in the neighbourhood, and sent a mulatto girl, his servant, of the age of about thirteen, for the gun, desiring the person in whose house he lodged to take the priming out; which he did, and told the girl so, and delivered the gun to her, and she put it down in the kitchen, resting on the butt, and soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a young boy, saying she would shoot him, and drew the trigger, and the gun went off, and wounded the boy; it was held that the defendant was liable to

(a) *R. v. Archer*, 1 F. & F. 351. As no more violence appears to have been used than was necessary to obtain possession of the gun, this case cannot be considered as rightly decided after *Blades v. Higgs*, 10 C. B. (N. S.) 713.

(b) *R. v. Wesley*, 1 F. & F. 528. Lord Campbell refused to reserve the point; and yet it seems well deserving of better consideration. If the prisoner had died from the excess of violence inflicted by the deceased, it cannot be doubted that the deceased would have been guilty of manslaughter, and it is not a little startling to hold that that excess of violence which caused the gun to explode is to make the prisoner guilty of manslaughter. Suppose the deceased had pulled

the trigger intending to shoot the prisoner, and in the struggle he had shot himself instead, it would be startling to hold the prisoner guilty of manslaughter. The reason why an excess of violence is punished is, that it is not in point of law attributable to the assault committed, but to the wrongful act of the party assaulted, and to hold the party assaulting guilty of the result of an excess of violence is to hold him guilty of the consequence of an act, of which the law not only holds him not to be guilty, but holds the other party to be guilty, or, to put it in still simpler terms, to hold him responsible for an act which the law holds not to be his act at all, but to be wholly the act of another person. — C. S. G.

an action for the injury. Lord Ellenborough, C. J.: 'The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to his landlord was not sufficient; consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible.' (c) And therefore it should seem, that if death had ensued the defendant would have been guilty of manslaughter.

Where a person fires at another a firearm, knowing it to be loaded, and therefore intending either to kill or to do grievous bodily harm, if death ensues the crime is murder; and if he does not know that it is loaded, and has taken no pains to ascertain, the crime is manslaughter. (d)

A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer: he carried it home, and shewed it to his wife; and she standing before him, he pulled up the cock, and touched the trigger; and the pistol went off and killed the woman. This was ruled manslaughter. (e) But the legality of the decision has been doubted, on the ground that the man examined the pistol in the common way, and used the ordinary caution deemed to be effectual in similar cases. (f) And Foster, J., after stating his reasons for disapproving of the judgment, says, that he had been the longer upon the case, because accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall amongst the nearest friends and relations; and then proceeds to state a case of a similar kind, in which the trial was had before himself. Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbours, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way: but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church; and in the evening, returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger; and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was

(c) *Dixon v. Bell*, 5 M. & S. 198.

(d) *R. v. Campbell*, 11 Cox, C. C. 323.

*R. v. Jones*, 12 Cox, C. C. 628.

(e) *Rampton's case*, Kel. 41.

(f) *Fost. 264*, where it is said, that perhaps the rammer, which the man had not tried before, was too short, and deceived him. But, *quæ*, whether the ordinary and proper precaution would not have been to have examined the pan, which in all probability must have been primed. The rammer of a pistol, or gun, is so frequently too short, from having been accidentally broken, that

it would be very incautious in a person previously unacquainted with the state of the instrument to rely upon such proof as he could receive from the rammer, unless it were passed so smartly down the barrel as clearly to give the sound of the metal at the bottom. However, there is a *quæ* to the case in the margin of the report, and it appears that the learned Editor (*Holt, C. J.*) was not satisfied with the judgment; and that it is one of the points which, in the Preface, he recommends for further consideration.

at church, a person belonging to the family privately took the gun, charged it, and went after some game; but, before the service at church was ended, returned it, loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance, as he had left it. 'I did not inquire,' says Foster, J., 'whether the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury that, if they were of the same opinion, they should acquit him: and he was acquitted.' (g)

An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding; and that in consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, on which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in mines in the neighbourhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left, the probable consequence would be that the corf striking against it would upset, and occasion death or injury. Tindal, C. J.: 'If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death but manslaughter. If the wrongful act was done under circumstances which shew an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance, the act was one of mere wantonness and sport, but still the act was wrongful—it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death. (g)

But where a person wrongfully and wantonly threw a large box from a pier into the sea and accidentally struck and killed a man who was swimming under the pier:—Field, J., after consulting Mathew, J., said that the question of negligence must be left to the jury and not the mere question whether the death was caused by the wrongful act of the prisoner. The mere fact that the prisoner had committed a civil wrong ought not to be used as an incident which was a necessary step in a criminal case. (gg)

A singular case is reported at some length (h) of a trial of a case of manslaughter at Carlisle, in which the facts were that the prisoner had assaulted a woman carrying an infant, and had so frightened the infant that it died in about six weeks. Denman, J., who tried the case, left it to the jury to say if the assault on the woman

(g) Fenton's case, 1 Lewin, 179. Tindal, C. J.

(gg) R. v. Franklin, 15 Cox, C. C. 163.  
(h) R. v. Towers, 12 Cox, C. C. 53.



was the direct cause of the death of the infant.<sup>1</sup> The prisoner was acquitted. (*k*)

Where sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue in the pursuit of them, the party killing is guilty of manslaughter. (*l*) Prize-fighting, public boxing matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have been considered unlawful. (*m*) For in these cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained; and meetings of this kind have also a strong tendency in their nature to a breach of the peace. (*n*) Therefore, where the prisoner had killed his opponent in a boxing match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden. (*o*)

There is no doubt that prize-fights are altogether illegal; indeed, just as much so as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are in point of law guilty of an assault. (*p*) In one case it appeared that there was a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks, which they used with great violence, and the deceased died in consequence of blows received on this occasion, and for the prisoner it was attempted to be proved that, though he was present during the fight, yet he neither did nor said anything. Littledale, J., said, 'If the prisoner was at this fight encouraging it by his presence, he is guilty of manslaughter, although he took no active part in it. My attention has been called to the evidence of those witnesses who have said that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encouraged it by their presence: I mean if they remained present during the fight. I say that if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. This is

(*k*) See *ante*, p. 10.

(*l*) Fost. 259, 260. 1 East, P. C. c. 5, s. 41, p. 268.

(*m*) Fost. 260.

(*n*) 1 East, P. C. c. 5, s. 42, p. 270.

(*o*) Ward's case, O. B. 1789, *cor.* Ashurst, J. 1 East, P. C. c. 5, s. 42, p. 270.

(*p*) R. v. Perkins, 4 C. & P. 537. Patterson, J. R. v. Bellingham, 2 C. & P. 234, Burrough, J. R. v. Hargrave, 5 C. & P. 170, Patterson, J. In the last case it was held, that persons present at a prize-fight were not such accomplices as to need corroboration. See also R. v. Coney, 8 Q. B. D. 534, *infra*.

#### AMERICAN NOTE.

<sup>1</sup> It has been held in America that a person who persists in firing off a gun near another who is ill, after being told that the discharge will have a prejudicial effect upon that other is indictable at common law. C.

v. Wing, 9 Pick. 1, 19 Am. D. 347, and presumably, if the sick person died from the shock, the person who fired the gun might be guilty of manslaughter.

my opinion of the law of this case. However, you ought to consider whether the deceased came by his death in consequence of blows he received in the fight itself; for if he came by his death by any means not connected with the fight itself, that is, if his death was caused by the mob coming in with bludgeons, and taking the matter as it were out of the hands of the combatants, then persons merely present encouraging the fight would not be answerable, unless they are connected in some way with that particular violence. If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued from violence unconnected with the fight itself, that is, by blows given not by the other combatant in the course of the fight, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter.' (q)

The above statement of the law would appear not to be strictly accurate, for it has been held that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of aiding and abetting an assault, although the mere presence unexplained may afford some evidence for the consideration of a jury. (qq)

The custom of cock-throwing at Shrovetide has been considered as an idle, dangerous, and unlawful sport; and accordingly where a person throwing at a cock missed his aim, and killed a child who was looking on, Foster, J., ruled it to be manslaughter; and, speaking of the custom, he says, 'it is a barbarous, unmanly custom, frequently productive of great disorders, dangerous to the bystanders, and ought to be discouraged.' (r) So throwing stones at another wantonly in play, being a dangerous sport without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter. (s)

Such sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, such as playing at cudgels, or foils, or wrestling by consent, are deemed lawful sports; and if either party happen accidentally to be killed in such sports, it is excusable homicide by

(q) *R. v. Murphy*, 6 C. & P. 103. Little-  
dale, J., and Bolland, B. See also *R. v.*  
*Young*, 8 C. & P. 644. *Ante*, p. 697.

(qq) *R. v. Coney*, 8 Q. B. D. 534,<sup>1</sup>  
per Denman, J., Huddleston, B., Manisty,

Hawkins, Lopes, Stephen, Cave, and North,  
JJ. (Lord Coleridge, C. J., Pollock, B., and  
Mathew, J., diss.)

(r) *Fost.* 261.

(s) 1 Hawk. P. C. c. 29, s. 5.

#### AMERICAN NOTE.

<sup>1</sup> Upon this topic may be consulted the following American cases, which in substance seem to accord with the English cases that a mere accidental presence is not sufficient, but that intentional presence is some evidence of participation. *Kemp v. C.*, 80 Va. 443. *Butler v. C.*, 2 Duv. 435. *S. v. Farr*, 33 Iowa, 553. *S. v. Hardy*, Dudley, S. C. 236. *P. v. Woodward*, 45 Cal. 203. *Jackson*

*v. S.*, 20 Tex. Ap. 190. *U. S. v. Johnson*. 26 Fed. Rep. 682. *Vowells v. C.*, 83 Ky. 193. *S. v. Maloy*, 44 Iowa, 104. *Ward v. C.*, 14 Bush, 283. *Golden v. S.*, 18 Tex. Ap. 637. *Lowry v. S.*, 72 Ga. 649. *Tullis v. S.*, 41 Tex. 593. *Clem v. S.*, 33 Ind. 418. *Plummer v. C.*, 1 Bush, 76. *Burrell v. S.*, 18 Tex. 713. *C. v. Cooley*, 6 Gray, 350.

misadventure. (t) A different doctrine, indeed, appears to have been laid down by a very learned judge: (u) but the grounds of that doctrine have been ably combated by Foster, J., who gives this good reason for considering such sports as lawful, that bodily harm is not the motive on either side. (v) And certainly, though it cannot be said that they are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed; and, though the weapons used be not of a deadly nature, yet, if they may breed danger, there should be due warning given, that each party may start upon equal terms. For, if two be engaged to play at cudgels, and the one make a blow at the other, likely to hurt, before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not murder, the intent not being malicious. (w)

Seven men were indicted for manslaughter. They had been sparring with gloves on, and the deceased was with them. After several rounds the deceased fell and struck his head against a post, whilst he was sparring with the prisoner. The men were all friendly, but as the deceased and the prisoner came up to the last round they were 'all in a stumble together.' The medical testimony was to the effect that sparring might be dangerous, but that death would be unlikely to result from such blows as had been given. The danger would be where a person was able to strike a straight blow, but the danger would be lessened as the combatants got weakened. Bramwell, B., said, the difficulty was to see what there was unlawful in this matter. It took place in a private room; there was no breach of the peace. No doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter; because a fight was a dangerous thing and likely to kill; but the medical witness here had stated, that this sparring with the gloves was not dangerous, and not a likely thing to kill. After consulting Byles, J., Bramwell, B., said, that he retained the opinion he had previously expressed. It had, however, occurred to him that supposing there was no danger in the original encounter, the men fought on until they were in such a state of exhaustion that it was probable they would fall, and fall dangerously, and if death ensued from that, it might amount to manslaughter, and he proposed, therefore, so to leave the case to the jury and reserve the point if necessary. (x)

Where on a trial for manslaughter it appeared that the prisoner came into a shop and pulled a young lad by the hair off a cask where he was sitting, and put his arm round his neck and spun him round, and they came together out of the shop, and the prisoner kept spinning him round, and the lad broke away from him, and in con-

(t) *Fost.* 259, 260. 1 *East*, P. C. c. 5, s. 41, p. 268.

(u) 1 *Hale*, 472.

(v) *Fost.* 260.

(w) 1 *East*, P. C. c. 5, s. 41, p. 269. See *R. v. Young*, *post*, note (z).

(z) *R. v. Young*, 10 *Cox*, C. C. 371. The

jury returned a verdict of not guilty. It has since been held by the Court for Crown Cases Reserved that if the parties met intending to fight till one gave in from exhaustion or injury received, it would be a prize-fight and unlawful, whether they fought in gloves or not. *R. v. Orton*, 14 *Cox*, C. C. 226.

sequence, and at the moment of his so doing, the prisoner being intoxicated, reeled into the road, and against the deceased who was passing, and knocked her down, and she died shortly afterwards ; and the lad said he did not resist the prisoner—he thought the prisoner was only playing with him, and was sure that it was intended as a joke throughout. Erle, J., told the jury : ‘ Where the death of one person is caused by the act of another, while the latter is in pursuit of any unlawful object, the person so killing is guilty of manslaughter, although he had no intention whatever of injuring him who was the victim of his conduct. Here, however, there was nothing unlawful in what the prisoner did to this lad, and which led to the death of the woman. Had this treatment of the boy been against his will, the prisoner would have been committing an assault—an unlawful act—which would have rendered him amenable for any consequences resulting from it ; but as everything that was done was with the boy’s consent, there was no assault, and consequently no illegality. It is in the eye of the law an accident, and nothing more.’ (y)

Ordinarily the weapons made use of upon such occasions are not deadly in their nature ; but, in some sports, the instruments used are of a deadly nature ; yet, in such cases, if they be not directed by the persons using them against each other, and therefore no danger be reasonably to be apprehended, the killing which may casually ensue will be only homicide by misadventure. Such will be the case, therefore, where persons shoot at game, or butts, or any other lawful object, and a bystander is killed : (z) and with respect to the lawfulness of shooting at game, it may be observed, that though the party be not qualified, the act will not be so unlawful as to enhance the accidental killing of a bystander to manslaughter. (a)

Though the sports be not in their nature unlawful, yet, if the weapons used be of an improper and deadly nature, the party killing will be guilty of manslaughter ; as was the case of Sir John Chichester, who unfortunately killed his man-servant as he was playing with him. Sir John Chichester made a pass at the servant with the sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard ; and the thrust not being effectually broken, the servant was killed by the point of the sword. (b) This was adjudged manslaughter : and Foster, J., thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm. (c)

(y) *R. v. Bruce*, 2 Cox, C. C. 262.

(z) 1 Hale, 38, 472, 475. 1 Hawk. P. C. c. 29, s. 6. 1 East, P. C. c. 5, s. 41, p. 269.

(a) 1 Hale, 475. Fost. 259.

(b) Sir John Chichester’s case, 1 Hale, 472, 473. Allyn, 12 Keil. 108.

(c) 1 Hale, 473. Fost. 260. 1 East, P. C. c. 5, s. 41, p. 269. But see in Hale, 473,

the following note :— ‘ This seems a very hard case ; and indeed the foundation of it fails ; for the pushing with a sword in the scabbard, by consent, seems not to be an unlawful act ; for it is not a dangerous weapon likely to occasion death, nor did it so in this case, but by an unforeseen accident, and therein differs from the case of jousting,

The deceased met with his death in the course of a game at football played according to the Association rules. It appeared that the deceased was kicking the ball when the prisoner in charging him struck him with his knee in the stomach, inflicting injuries which proved fatal. Bramwell, L. J., told the jury: 'If a man is playing according to the rules and practice of the game and not going beyond, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But if the prisoner intended to cause serious hurt to the deceased, or if he knew that in charging as he did he might produce serious injury, and was indifferent and reckless as to whether he did so or not, then the act would be unlawful.' The jury acquitted the prisoner. (cc)

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and therefore if a bystander be killed by the shot, such killing will be manslaughter. (d)

It has been shewn, that where a body of persons, resolving generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, happen to kill any one in the prosecution of this unlawful purpose, they will be guilty of murder. (e) Yet, in one case, where divers rioters, having forcibly gained possession of a house, afterwards killed a partisan of the person whom they had ejected, as he, in company with a number of others, was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty only of manslaughter. (f) It is said, that perhaps it was so adjudged for this reason, that the person slain was so much in fault himself. (g)

## SEC. V.

### *Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Lawful Authority.*

An act, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder. (h) And as

or prize-fighting, wherein such weapons are made use of as are fitted and likely to give mortal wounds.<sup>1</sup>

(cc) *R. v. Bradshaw*, 14 Cox, C. C. 83.

(d) 1 Hale, 475.

(e) *Ante*, p. 125.

(f) *Drayton Basset case*, Crom. 28. 1 Hale, 440.

(g) 1 Hawk. P. C. c. 31, s. 53.

(h) *Ante*, p. 129, *et seq.*

## AMERICAN NOTE.

<sup>1</sup> So in America, where death ensued in consequence of the prisoner brandishing a loaded revolver in a room where there were other persons, or playing with a loaded pistol and pointing it at a companion who dared him to shoot, it was held to be manslaughter.

*S. v. Emery*, 78 Mo. 77, 47 Am. R. 92. *S. v. Vines*, 93 N. C. 493; 53 Am. R. 466. See also *P. v. Fuller*, 2 Par. Cr. 16; *Studstill v. S.*, 7 Ga. 2; *S. v. Roane*, 2 Dev. 58; *Collier v. S.*, 39 Ga. 31; 99 Am. D. 449.

the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter.

There is a case reported in *Strange*, as a case of manslaughter, which, if the circumstances of it were as stated in that report, does not seem to have been entitled to so favourable a construction. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, 'He did not intend to hurt the officers, but he would not be ill used.' The officer who had been sent for the attorney's bill soon returned to his companion at the lodgings; and, words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him; one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death's wound. (i) This is reported to have been holden manslaughter, by reason of the first assault with the cane: but Foster, J., thinks it a very extraordinary case, as thus reported; and mentions the following additional circumstances, which are stated in another report. (j) 1. Mr. Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When Mr. Lutterel laid the pistols on the table, he declared that he brought them down because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot (for both pistols were discharged in the affray), and slightly wounded on the wrist by some sharp-pointed weapon, and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Mr. Lutterel's begging for mercy was not that he was on the ground begging for mercy, but that on the ground he held up his hands as if he was begging for mercy. Upon these facts the Chief Justice directed the jury, that if they believed Mr. Lutterel endeavoured to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as Mr. Lutterel gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done, if the debt had not been paid or bail given, he declared it would be no more than manslaughter. (k)

Where an inquisition alleged that the defendants were trustees under an Act of Parliament, and that it was their duty to contract for the repair of a road, and also to repair the road, and that they

(i) *R. v. Tranter*, Stra. 499. *Ante*, p. 41.

(k) *Fost.* 293, 294.

(j) 6 St. Tri. 195. 16 St. Tri. (by Howell) 1.

did feloniously neglect to contract for the reparation of the said road, and did feloniously neglect to repair the same, and that W. B. being riding in a barrow along the said road, the defendants by their neglect to contract for the reparation of the said road, and by their neglect to repair the same, did cause one wheel of the said barrow to fall into a large hole in the said road, and the said W. B. to be thereby thrown with great violence from the said barrow upon the ground, whereby he was killed; it was held that the inquisition was bad: not only must the neglect, to make a party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect, and here the death was not the direct consequence of the neglect charged. (l)

If a chemist's apprentice be guilty of negligence in delivering medicine, and death ensues in consequence, he is guilty of manslaughter. Upon an indictment for the manslaughter of a child, it appeared that the child being ill, the mother sent to a chemist for a pennyworth of paregoric; the chemist's apprentice delivered a phial, with a paregoric label on it, but with laudanum in it; and the mother, supposing it to be paregoric, gave the child six or seven drops, which killed it. The laudanum bottle and the paregoric bottle stood side by side. Bayley, J., told the jury:—‘If you think there was negligence on the part of the prisoner, you will find him guilty; if not, you must acquit him.’ (m)

The prisoner was indicted for manslaughter, in having, by negligence in the manner of slinging a cask, caused the same to fall and kill two females, who were passing along the causeway. It appeared that there were three modes of slinging casks customary in Liverpool: one by slings passed round each end of the cask; a second by can hooks; and a third in the manner in which the prisoner had slung the cask, which caused the accident—namely, by a single rope round the centre of the cask. The cask was hoisted up to the fourth story of a warehouse, and on being pulled endways towards the door, it slipped from the rope as soon as it touched the floor of the room. Parke, J., told the jury:—‘The double slings are undoubtedly the safest mode; but, if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him.’ (n)

Where the prisoner, who was an ironfounder, was employed to make twelve cannon, to celebrate the passing of the Reform Bill, and four of them were sent home and tried, and one of them burst under the touch-hole, and was sent back to the prisoner, with orders to have it melted up; but the prisoner returned it nailed down to a carriage, and there was some lead in it, which must have been put there to stop up the part which had burst, as it matched the former aperture; and the cannon, being loaded not heavier than usual, burst, and thereby killed the deceased, it was held that the prisoner was guilty of manslaughter. (o)

The prisoner had a firework-shop in the Westminster Road, where he had for some time carried on openly the business of selling fire-

(l) *R. v. Pocock*, 17 Q. B. 34.

(m) *Tessymond's case*, 1 Lew. 169. See also cases *ante*, tit. *Murder*, p. 25.

(n) *Rigmaidon's case*, 1 Lew. 180.

(o) *R. v. Carr*, 8 C. & P. 163, Bayley and Gurney, BB., and Patteson, J.

works. He had also a workshop at a neighbour's named Sunter, and a factory at Peckham. He supplied Vauxhall and Cremorne, under contracts, with considerable quantities of fireworks. He made and kept his stock at the factory at Peckham, and from thence he used to take the supply necessary for the gardens daily to the house in Westminster Road, where they used to be kept for two or three hours before they were taken to the gardens. In Sunter's room the smaller sort of rockets were made, excepting the heads for holding the stars. These heads were added at the shop in Westminster Road. At the house in Westminster Road fireworks were offered for sale. No fireworks were made there except as follows:—First, the finishing the smaller rockets, and making stars for them of combustible matter; secondly, making fireworks called serpents; thirdly, making cases and filling them with combustible matter, called red, blue, and green fires. (p) The fire was employed for filling coloured cases used to imitate revolving lights in fireworks called wheels. These cases affixed were not used by themselves, but in connection with those fireworks, to add to their effect. The contents of the cases of fire made at the Westminster Road were combustible, and the red fire would explode if struck hard. Five or six pounds of fire were made every day in the house in Westminster Road, and filled there in the back room into cases with a rammer and mallet by persons employed for the purpose. At the time of the fire there was a quantity of the red and blue fire in the house, in the room where it was to be put into cases, in order to be used in the course of the business, and a quantity of fireworks for the evening. The prisoner being out of the house and not personally interfering, a fire broke out in the red and blue fire, which communicated to the fireworks, causing a rocket to cross the street and set fire to a house, in which the deceased was consequently burnt to death. It was contended that the fire was accidental in the sense of not being wilful or designed; that it did not happen through any personal interference or negligence of the prisoner; that he was entitled to the benefit of any distinction between its happening through negligence of his servants, or by pure accident without any such negligence; that the cases of red, &c. fire, were only parts of the fireworks, and not within the 9 & 10 Will. 3, c. 7; that it did not appear that it was by reason of making the fireworks that the mischief happened, and that the death was not the direct and immediate result of any wrong or omission on the prisoner's part. Willes, J., held that the prisoner was guilty of a misdemeanor in doing an act with intent to do what was forbidden by the statute, and that, as the fire was occasioned by such misdemeanor, and without it would not have taken place, or could not have been of such a character as to cause the death, a case was made out; but, upon a case reserved, the conviction was held wrong. Cockburn, C. J.: 'The keeping of the fireworks in the shop by the prisoner caused the death only by the superaddition of the negligence of some one else. By the negligence of the prisoner's servants the fireworks ignited, and the house in which the deceased was, was

(p) To this last part of the business the particular attention of the judges was directed.



set on fire and death ensued. The keeping of the fireworks may be a nuisance; and if, from the unlawful act of the prisoner, death had ensued as a necessary and immediate consequence, the conviction might be upheld. The keeping of the fireworks, however, did not alone cause the death: *plus* that act of the prisoner there was the negligence of the prisoner's servants.' (q)

Major-General Hutchinson was commandant of the forces at the garrison of Plymouth. A target was placed in the Sound, under the general directions of the Horse Guards, and the artillerymen were accustomed to practise by firing at it with ball. One day while such practice was proceeding a ball missed the target, and, striking the waves, ricocheted and hit a boatman, who was taking a boat across the Sound in the lawful and proper exercise of his vocation, and in a place where he might lawfully be. Byles, J., after stating that the depositions were extremely long and vague, so that he hardly knew in what shape the charge would be presented, is said to have told the grand jury that 'manslaughter was when one man was killed by the culpable negligence of another. A slight act of negligence was not sufficient—all men and women were negligent at some time; it would depend on the degree of negligence. A slight deviation from proper care and skill was not sufficient. By way of illustration: suppose a man were to fire a gun in a field where he saw no one, and as he fired another man suddenly raised his head from a ditch; he could not say that that man would be guilty of manslaughter; it would be held not to be culpable negligence. (r) But supposing a man were to fire down the High Street of Exeter because he saw no one, and some one was suddenly to appear, and he was killed, that would be culpable negligence in the man who fired the gun. It would seem, and the results shewed it, that the

(q) *R. v. Bennett, Bell, C. C. 1.* The case stated that the question of a nuisance, independent of the statute, was disposed of upon the facts in favour of the prisoner. Not a single authority or case was referred to in the argument, or by the Court; and this case seems deserving of reconsideration. The death would not have happened except for the unlawful act of the prisoner; for, unless the combustibles had been where they were, the death would not have occurred. If they had spontaneously ignited, or a stranger had accidentally ignited them by striking his nailed boots on the floor, it cannot be doubted that the prisoner would have been guilty of manslaughter; but it is said that the negligence of the servant exonerates the master. It is submitted that, in point of law, it has no such effect. A master may be criminally responsible for the *wilful* acts of his servants, where they are done in the course of their employment and for his profit. *R. v. Dixon, 3 M. & S. 11*, and other cases, vol. i. p. 274; and *a fortiori*, he ought to be held to be criminally respon-

sible for the negligence of his servants in his employment, where that employment is a dangerous one, and carried on unlawfully in a place where it is perilous to the public. 'The law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which, on the recurrence of carelessness, will, in all probability, prove destructive to life;' *R. v. Lister, D. & B., C. C. 209*, vol. i. p. 735, and therefore a person, who carries on such an employment in such a place, must be taken to contemplate the carelessness of his servants as one of the natural consequences of his carrying it on, and ought to be held criminally responsible for it. See the principles laid down in *R. v. Lister*. The 9 & 10 Will. 3, c. 7, is repealed by the 23 & 24 Vict. c. 139, which amends the law relating to the making, keeping, and carriage of gunpowder and fireworks. C. S. G.<sup>1</sup>

(r) It is clear this would be no negligence at all. The case as put is of a man lawfully shooting in a lawful place, where he had no reason to suppose any other person was.

#### AMERICAN NOTE.

<sup>1</sup> As to liability of contractor for the acts of his servants. See *Stein v. S.*, 37 Ala. 123, vol. i. p. 274.

boat was within the range of fire; but that was no defence. If the man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result an action could not be maintained. But in a criminal case it was different. The Queen was the prosecutor, and could be guilty of no negligence; and if both the parties were negligent, the survivor was guilty; and therefore it was no defence that the boat was within danger. (s) He could only speculate upon the negligence imputed in this case. First, he did not know that it would be said that it was an improper place whether to fire from or to fire over. The gun was fired from one of the batteries kept on purpose for practice. It was said that this battery was too low; but that was not the point of defence. Therefore, subject to their better judgment, nothing could be imputed to the defendant as to the place whence the gun was fired. Then as to the place over which it was fired. Had the defendant the selection of it? Then in using the place, although an improper one, was he obeying military orders? If so, he would not be guilty. (t) Common danger did not make the place improper. He was a man performing a most important duty. Supposing, therefore, that the defendant had been personally engaged in the firing: if he thought that the place from which the gun was fired was not improper, and that the place to which the firing was directed was not improper, assisted by additional precautions, which might be used, he would not be responsible, because acting under the direction of superior authority. It seemed that complaints had been made by a great many persons residing in Plymouth and Devonport, and he must beg their attention to the orders the defendant had given. The major-general would impress upon the officers in command to see with the utmost diligence that the range was free before the firing. Then there was a second order. The major-general impresses upon the officers the necessity of seeing that all was free, as he should hold them personally responsible. He had hitherto presumed that the defendant had personally to do with the firing; and, if he had, he would not be guilty of manslaughter. But the next question was, did he personally superintend the firing or did he not? They would see whether he did or not. Was he guilty of a breach of duty in not personally superintending the firing? He could not see that he was. Again, it might be said, that if he issued orders it was his duty to see that proper persons were appointed to keep a proper look-out; and if proper persons were nominated by him, it did not appear whether they were properly disciplined, and it might be a question whether there was any negligence in them. There were persons with flags, but whether a proper look-out was kept might possibly be doubtful; whether means were taken for keeping a

(s) See cases *post*, p. 201.

(t) With all deference, this seems to be an error. The commission of a felony can never be excused by the order of any superior, except in cases where the circumstances are such as to warrant the act that is done, as in case of rebellion, &c. In other cases the law acknowledges no distinction between

the soldier and the private individual. See the charge of Tindal, C. J., vol. i. p. 582, note (d). And the command of the master is no defence to the servant. See *R. v. James*, 8 C. & P. 131. If the Horse Guards gave an order to practise at a particular place, that order would only justify practising in a careful and proper manner. C. S. G.

proper look-out they would have to determine. Under these circumstances it would be for them to say whether negligence was brought home to the defendant.' (u)

Where three men fired a rifle at a target placed in a tree in a field at a distance of 100 yards, and one of the shots killed a boy in a tree in a garden at 393 yards distance from the firing point: it was held that they had been guilty of a breach of duty in not having taken proper precautions to prevent injury, and were rightly convicted of manslaughter. (uu)

It is the duty of every man who drives a carriage on a public highway to drive it with such care and caution as to prevent, as far as is in his power, any injury to any person. (v) On an indictment for manslaughter, it appeared that the deceased was walking along a road, in a state of intoxication: the prisoner was driving a cart drawn by two horses, without reins; the horses were cantering, and the prisoner was sitting in front of the cart; on seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and one of the cart wheels passed over him, and he was killed; it was held, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if, from the rapidity of the driving, or from any other cause, the person cannot get out of the way in time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man, who drives any carriage, to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur. (w)

A foot passenger, though he may be infirm from disease, has a right to walk on the carriage-way, although there be a foot-path, and he is entitled to the exercise of reasonable care on the part of persons driving carriages along the carriage-way. (x)

Upon an indictment for manslaughter, the evidence was, that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the horse's head, and while he was sitting there, the cart went over a child, who was gathering up flowers on the road. Bayley, B., held, that the prisoner, by being in the cart, instead of at the horse's head, or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter. (y)

Upon an indictment for manslaughter, it appeared that there were two omnibuses, which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and the witnesses for the prosecution stated that the prisoner was whipping his horses just before his omnibus

(u) *R. v. Hutchinson*, 9 Cox, C. C. 555. This report is manifestly imperfect, and, as counsel are never present when the grand jury are charged, cannot be the report of any barrister.

(uu) *R. v. Salmon*, 6 Q. B. D. 79, see post, p. 203.

(v) *Frost*, 263. *Anon.*, O. B. 1704. 1 East, P. C. c. 5, s. 38, pp. 263, 264.

(w) *R. v. Walker*, 1 C. & P. 320, Garrow, B.

(x) *Boss v. Litton*, 5 C. & P. 407, Lord Denman, C. J. *R. v. Grout*, 6 C. & P. 629, Bolland, B., and J. A. Park, J.

(y) *Knight's case*, 1 Lew. 168. In a similar case, *Hullock, B.*, expressed a similar opinion, *ibid.*

upset. The defence was, that the horses in the omnibus driven by the prisoner took fright and ran away. Patteson, J.: 'The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable: for a man is not to say, "I will race along a road, and when I am got beyond another carriage I will pull up." If the prisoner did really race, and only when he had got past the other omnibus endeavoured to pull up, he must be found guilty; but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace, that he could not control them? If you are of that opinion you ought to convict him.' (z)

*Swindall* and *Osborne* were indicted for the manslaughter of J. Durose. The prisoners, who were each driving a cart and horse, were seen two miles and a half from the place where the deceased was killed. *Swindall* there paid the toll, not only for that night, but for having passed with *Osborne* through the same gate a day or two before. They then appeared to be intoxicated. They were next seen at a bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving; this was 990 yards from the place where the deceased was killed. They were next seen forty-seven yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike-gate a quarter of a mile from that place *Swindall*, who appeared all along to have been driving the first cart, told the toll-gate keeper, 'We have driven over an old man;' and desired him to bring a light, and look at the name on the cart, on which *Osborne* pushed on his cart, and told *Swindall* to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which *Swindall* said he had sold his concern to *Osborne*. The carts were loaded with pots from the Potteries. The surgeon stated that the deceased had a mark on his body, which would correspond with the wheel of a cart, and also several other bruises, and although he could not say that both carts had passed over the body, it was possible that both might have done so. For the prosecution it was contended, that it was perfectly immaterial in point of law whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving furiously along the road; that was an unlawful act, and as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. For the prisoners it was urged that the evidence only proved that one of the prisoners ran over the deceased, and that the other was entitled to be acquitted.

(z) R. v. Timmins, 7 C. & P. Patteson, J.

Pollock, C. B. : 'I think that is not so. I think the counsel for the Crown is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last, he would be equally liable. The person who runs over the man would be a principal in the first degree, and the other a principal in the second degree.' And in summing up, Pollock, C. B., said : 'The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct ; and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death ; for in this consists a great distinction between civil and criminal proceedings. (a) If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view ; for there each party is responsible for any blame that may ensue, however large the share may be ; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person.' And his Lordship then directed the jury on the other point in the manner above mentioned. (b)

On an indictment for manslaughter it appeared that the two prisoners were in a partial state of intoxication, and drove a gig along a road at a very rapid pace, and met three men, and at that time they were driving rapidly down a hill, the top of which was thickly shaded with trees, and when the three men got to the trees they found the deceased lying insensible in the middle of the road, presenting all the appearance of having just been run over by some vehicle, and he shortly afterwards died. He had been deaf from his childhood, and had contracted an inveterate habit of walking at all hours in the middle of the road, though he had been frequently warned of the probable consequences of doing so. It was contended that the prisoners ought to be acquitted, as the deceased had contributed to his own death. Rolfe, B. : 'Whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion, that if any one should drive so rapidly along a great thoroughfare leading to a large town, as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law, and, if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased.' 'There is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, amounting to illegality ; and there is no balance

(a) But see *R. v. Birchall*, 4 F. & F. 1087, and *R. v. Mastin*, 6 C. & P. 396.

(b) *R. v. Swindall*, 2 C. & K. 230. As to contributory negligence, see *post*, p. 201.

of blame in charges of felony ; but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse and gig, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself.' (c)

Upon a trial for manslaughter it appeared that the prisoner was standing up in a spring cart ; the reins were not in his hands, but lying on the horse's back ; while the horse was trotting down a hill with the cart, the deceased, a child about three years old, ran across the road before the horse, and the wheel of the cart knocked it down and killed it. It did not appear that the prisoner saw the child before the accident. Erle, J., told the jury, that if the prisoner had had the reins, and by using them could have saved the child, he was guilty of manslaughter ; but if they thought he could not have saved the child by pulling the reins or otherwise by their assistance, they must acquit him. (d)

Where, on an indictment for manslaughter, it appeared that the deceased was knocked down by a car driven by the prisoner, and great numbers were in the street at the time : Perrin, J., told the jury, that this unusual concourse of people, instead of offering any extenuation for the prisoner, or diminishing the criminality of his careless driving, if they found it to have been such, would but be a circumstance to add to it, and that it was his duty, as well as of all driving upon such occasions, to take more than ordinary precautions against accidents, and to use more than ordinary diligence for the safety of the public. (e)

A person driving a carriage is not bound to keep on the ordinary side of the road ; but if he do not do so, he is bound to use more care and diligence, and keep a better look-out, that he may avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road. (f)

An inquisition charged that the prisoner did ' propel and force ' a vessel against a skiff, whereby the deceased was drowned. The counsel for the prosecution, in opening the case, said, that he apprehended that the rule as to traversing the river Thames was the same as that applicable to the mode of passing along any of the Queen's common highways : therefore, if the speed at which, or the manner in which, the prisoners were navigating the vessel, and were proceeding before they saw the skiff, was such as to prevent them, after they did see it, from stopping in time to prevent mischief to the person in it, they would be responsible for the offence of manslaughter, if his death happened in consequence ; if, on a misty

(c) *R. v. Longbottom*, 3 Cox, C. C. 439.

(d) *R. v. Dalloway*, 2 Cox, C. C. 273.

(e) *R. v. Murray*, 5 Cox, C. C. 509.

(f) *Pluckwell v. Wilson*, 5 C. & P. 375, Alderson, B. In Christian's note, 1 Bl. Com. 74, it is said ' that the law of the road

is that horses and carriages should respectively keep the left side of the road, and consequently in meeting should pass each other on the whip hand.' *Leame v. Bray*, 3 East, R. 593.

night, the prisoners were proceeding at such a rate that they could not stop in time, their so proceeding was illegal, and, as death ensued, they were responsible. Parke, B.: 'You have stated the law most correctly. There is no doubt that those who navigate the Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway, either by furious driving or negligent conduct.' (*h*)

On an indictment for manslaughter it appeared that the prisoner was a pilot, and was on board a Portuguese barque sailing down the Thames; the barque was manned entirely by Portuguese, who did not understand English or nautical directions. The deceased was shrimping in a small boat, and while such occupation is going on the boat is kept motionless by the shrimp net. When the barque was about a quarter of a mile distant the boat made a signal to her, and when she was within twenty yards the deceased hailed her. The prisoner called to the Portuguese helmsman to turn the vessel to the starboard, but the helmsman, not understanding the prisoner's directions, steered to the larboard; the barque struck the deceased and killed him. Lord Denman, C. J., after consulting Alderson, B., told the jury: 'The law is, that if the prisoner has produced the death by any conduct of his, he is guilty of manslaughter. It appears to me that he was the person guiding and directing the vessel, and that he is responsible for its management. It is extremely unfortunate that he did not, in the first instance, make the foreigners understand such simple directions as starboard and larboard. You will consider whether there was some negligence upon the part of the prisoner in not making the foreigners understand thoroughly. I take your opinion whether he was guilty of negligence in this respect, and whether that negligence caused the death. If you think so, you will find him guilty.' (*i*)

The captain and pilot of a steamer were indicted for manslaughter in causing a death by running down a smack, and it appeared that at the time the steamer started there was a man forward in the fore-castle to keep a look-out, but at the time when the accident happened, which was about an hour afterwards, the captain and pilot were both on the bridge which communicates between the paddle-boxes; the night was dark, and it was raining hard; the steamer had a light at each end of the topsail yard; an oyster smack, on board which the deceased was, was coming up the Thames without any light on board; the deceased was below: a boy who was on board the smack stated that when the steamer struck the smack he got on board the steamer, and found nobody forward; other witnesses were present to shew that no person was forward on the look-out at the time. J. A. Park, J.: 'Then the captain is not responsible in felony; it is the fault of the person who ought to be there, and who may have disobeyed orders; if the captain leaves the pilot on the paddle-box, as he did here, he is not criminally responsible. In a criminal case every man is answerable for his own acts; there must be some personal act; these persons may be civilly responsible.' Alderson, B., 'If you could shew that there was a man at the bow,

(*h*) *R. v. Taylor*, 9 C. & P. 672.(*i*) *R. v. Spence*, 1 Cox, C. C. 352.

and that the captain had said, "Come away, it's no matter about looking out," that would be an act of misconduct on his part. If you can shew that the death of the deceased was the result of any act of personal misconduct on the part of the captain, you may convict him.' J. A. Park, J., 'Supposing he had put a man there, and had gone to lie down, and the man had walked away, do you mean to say he would be criminally responsible? And you must carry it to that length, if you mean to make anything of it.' Alderson, B., 'I think this case has arrived at its termination; there is no act of personal misconduct or personal negligence on the part of these persons at the bar.' (*j*)

Where an indictment for manslaughter alleged that the prisoner was employed to superintend and keep in motion the working of an engine at a colliery for pumping out the water from the colliery, and thereby keeping a clear course for the passage of air and the dispersing of foul air, and that the prisoner neglected to superintend and keep in motion the working of the engine, and did thereby prevent a clear course being left for the passage of the air, and did cause noxious gases to accumulate, and then went on to state that an explosion took place and death ensued; it was proved that there was an old and new mine, and between the two there was a passage for the air from the old to the new mine, and in the old mine there was an engine which was used for the purpose of pumping the water out of that mine, in order that the passage between the two mines might be kept clear, and the prisoner, an engineer, had been employed to work this engine, but he had absented himself from his duty for three days, during which the engine did not work, and the consequence was that the water collected in, and prevented the air from circulating through, the passage between the mines, thereby occasioning an accumulation of foul air, which exploded and caused the death. It was objected that the charge in the indictment was no more than a nonfeasance, and did not disclose any act of misfeasance; and that acts of mere nonfeasance did not make a man criminally responsible. Wightman, J., was of opinion that the facts as charged did not constitute an indictable offence, observing that the indictment contained no direct allegation that it was the duty of the prisoner to do that which he was alleged to have neglected to do. (*k*)

An indictment for manslaughter alleged that it was the duty of the prisoner to cause to be ventilated a coal mine, and to cause it to be kept free from noxious gases, and that the prisoner feloniously omitted to cause the mine to be ventilated, and that noxious gases accumulated and exploded, whereby the deceased was killed. It

(*j*) *R. v. Allen*, 7 C. & P. 153. *Quære*, whether this case amounts to more than this, that the captain had placed a proper person forward, who had left his post with-

out the captain perceiving it? See *Fost.* 322. *R. v. Green*, 7 C. & P. 156.<sup>1</sup>

(*k*) *R. v. Barrett*, 2 C. & K. 343. This case was before *R. v. Hughes*, *post*, p. 196, and *R. v. Lowe*, *post*, p. 195.

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#### AMERICAN NOTE.

<sup>1</sup> The cases of *R. v. Green* and *R. v. Allen* are said by Mr. Bishop, vol. ii. s. 667, to be contrary to principle, if they are supposed

to decide that a mere nonfeasance is not indictable. See also Bishop, i. s. 217 (3).



appeared that the deceased was killed by the explosion of fire damp in a colliery, of which the prisoner was a sort of manager, and it was imputed on the part of the prosecution that this explosion would have been prevented if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. For the defence it was attempted to be proved that it was the duty of one of the persons killed to have reported to the prisoner that an air-heading was required, and that he had not done so. In summing up, Maule, J., said, 'The questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the plain and ordinary duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have done it, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner; for if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one, who was negligent, to say that another was negligent also, and thus, as it were, to try to divide the negligence among them.' (l)

Upon an indictment for manslaughter it appeared that the prisoner was an engineer, and his duty was to manage a steam engine employed for the purpose of drawing up miners from a coal pit; and when the skip containing the men arrived at the pit's mouth his duty was to stop the revolution of the windlass, so that the men might get out. On the day in question he deserted his post, leaving the engine in charge of an ignorant boy, who, before the prisoner went away, declared himself to the prisoner to be utterly incompetent to manage such a steam engine as the one entrusted to him. The prisoner neglected this warning, and threatened the boy, in case he refused to do as he was ordered. The boy superintended the raising of two skips from the pit with success; but on the arrival at the pit's mouth of a third, containing four men, he was unable to stop the engine, and the skip being drawn over the pulley, one of the men was thrown down the shaft of the pit, and killed on the spot. The engine could not be stopped, 'in consequence of the slipper being too low,' an error which any competent engineer could have rectified, but which the boy in charge of the engine could not. For the prisoner it was contended that a mere omission or neglect of duty could not render a man guilty of manslaughter. (m) Lord Campbell, C. J., 'I am clearly of opinion that a man may, by a neglect of duty, render himself liable to be convicted of manslaughter, or even of murder.' (n)

(l) *R. v. Haines*, 2 C. & K. 368. See *R. v. Swindall*, 2 C. & K. 230, *ante*, p. 191, as to the last point.

(m) *K. v. Green*, and *R. v. Allen*, *ante*, p. 194.

(n) *R. v. Lowe*, 3 C. & K. 123. Lord Campbell discussed this case with the Edi-

tor, and they fully concurred that a man might render himself equally culpable by neglecting to do his duty as by a wilful act. *E. g.* It is the duty of a pointsman to turn the switches on the approach of a train, and if he wilfully neglects to do so, whereby an accident happens and a man is killed;

Upon an indictment for manslaughter it appeared that the prisoner was a banksman at the top of a shaft of a colliery, where there were an engine and ropes to send down bricks and materials in a bucket, and draw up the empty baskets. It was his duty to send down materials, and to superintend the proper letting down of the buckets, and to place the stage hereafter mentioned. The buckets were run on a truck on to a movable stage over half of the area of the top of the shaft, and there the bucket was attached and lowered down, the stage being removed. The prisoner on the occasion in question had omitted to put or cause to be put the stage on the mouth of the shaft, and in the absence of the stage a bucket with a truck and bricks ran along the tram-road, into the shaft, fell down the pit, and killed the deceased. It did not appear that the prisoner was directing or driving the waggon at the time. It was left to the jury to say whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of omission or commission, and they found that the death arose from the negligent omission of the prisoner in not putting the stage on the mouth of the pit; and, upon a case reserved, Lord Campbell, C. J., delivered judgment: 'We are of opinion that this conviction ought to be affirmed. It was the duty of the prisoner to place the stage on the mouth of the shaft; the death of the deceased was the direct consequence of the omission of the prisoner to perform this duty; if the prisoner, of malice aforethought, and with a premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer this duty. (o) But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter.' (oo)

The prisoner (who was indicted for manslaughter of one Richard Gibson) was employed by a Mr. Harrison, an extensive colliery proprietor, near Dearham, and who was also owner of a tramway which crossed the Maryport and Carlisle turnpike road. It was the prisoner's duty to give warning to any persons when any trucks might cross the said road. The tramway was in existence before the road,

another man wilfully turns some points with which he has nothing to do, and a death occurs; the offence of the one is precisely the same as that of the other. A man who wilfully neglects to feed his infant child is just as guilty of murder as if he poisoned it. Indeed, it has been truly said, that 'between wilful mischief and gross negligence the boundary line is hard to trace; I should rather say, impossible. The law runs them into each other, considering such a degree of negligence as some proof of

malice,' per Lord Denman, C. J. *Lynch v. Nurdin*, 1 Q. B. 29. — C. S. G. 'There must be negligence so great as to satisfy a jury that the offender had a wicked mind in the sense of being reckless and careless whether death occurred or not.' Per Brett, J. *R. v. Nicholls*, 13 Cox, C. C. 75; *R. v. Handley*, 13 Cox, C. C. 79; *R. v. Elliott*, 16 Cox, C. C. 710.

(o) *R. v. Edwards*, 8 C. & P. 611. *R. v. Goodwin*, 1 Russ. C. & M. 563.

(oo) *R. v. Hughes*, D. & B. 248.

and in the Act by which the road was made there was no clause imposing on Mr. Harrison the duty of placing a watchman where the tramway crossed the road. On the 8th of February, 1869, the deceased was crossing the tramway, having received no warning that any trucks were about to cross the road. As he was crossing, however, he was knocked down by some trucks, and was killed. On inquiry, it appeared that the prisoner was absent from his post at that time, although he had strict orders never to be absent. Lush, J., said, that there being no clause in the Act compelling Mr. Harrison to place a watchman where the tramway crossed the road, the prisoner was merely the private servant of Mr. Harrison: and that, consequently, his negligence did not constitute such a breach of duty as to make him guilty of manslaughter. (*p*)

The prisoner was a porter at the Brighton Station, and it was his duty to start the trains. It being an excursion day, three up trains came in succession, all of them late, so that none of them could be started at the proper time. There was a rule of the company, that under such circumstances no train should be started at intervals of less than five minutes after the preceding one. The case against the prisoner was that he had started the three trains so that there was only an interval of three or four minutes between the second and third. The first train arrived safely at the Clayton Tunnel (seven miles from Brighton), and passed safely through, and the man at the Brighton end of the tunnel, when it entered, telegraphed 'train in;' but, owing to some improper working of the signal at his end, became confused, and on the arrival of the second train, not feeling certain that he had received the signal which authorised him to send on the second train, again telegraphed 'train in' just as the second train had gone into the tunnel. Fearing that the signal might be misunderstood, he shewed the red flag, which he supposed the second train had not seen, but which had the effect of pulling up the second train in the tunnel. He again telegraphed to ask 'is that train out?' upon which the man at the north end of the tunnel, supposing that this referred to the first train, telegraphed 'train out,' whereupon the porter at the Brighton end of the tunnel sent the third train into the tunnel, and this ran into the second, which had come to a standstill in consequence of seeing the red flag. Erle, C. J., is reported to have told the grand jury that 'they must be satisfied before they found the bill that there was a *prima facie* case of such criminal negligence as had been the proximate and efficient cause of the catastrophe. The negligence imputed appeared to be the sending on one train after another in a shorter interval of time than, according to the rules, he ought to have done. A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared

(*p*) *R. v. Thomas Smith*, 11 Cox, C. C. 210. Query whether this case is accurately reported. In all probability the facts proved at the trial shewed that the prisoner had only neglected his duty to his employer by being absent from his post, and that the other servant managing the traffic, knowing

he was absent, allowed the truck to cross the road. To have proved the prisoner guilty it must have been shewn that he neglected some duty which he owed to the deceased as one of the public using the highway.

not to have been the proximate cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred. That this was in entire accordance with the authorities will appear from the most recent cases. The case is to be clearly distinguished from that of joint negligence. It is indeed well settled, that it is no defence in a case of manslaughter that the death was caused by the negligence of others as well as by that of the prisoner; for if the death of the deceased be caused partly by the negligence of others, the prisoner and all those others are guilty of manslaughter.' (q)

(q) *R. v. Ledger*, 2 F. & F. 857. *Erie*, C. J., then referred to *R. v. Haines*, *supra*, p. 195, and *R. v. Barrett*, *supra* p. 194. The great importance of placing the culpability of railway officials in a clear light has caused the following remarks, in which the words 'neglect' and 'negligence' are always used as importing such a degree of culpability as, if death ensued from it, the offence would amount to manslaughter at least. First, then, a clear distinction exists between negligence and a wilful act — a distinction well illustrated by the numerous cases, in which the rule has been established, that a master is answerable for the *negligent*, but not for the *wilful* act of his servant. And it should seem that if a railway official deliberately starts a train in direct opposition to the orders he has received, this is a wilful act, and that, as it is an intentional violation of his duty, it ought to be considered precisely in the same light as if it were done by a person who had no authority whatever to interfere with the train. Next, where a train is started before its proper time, and it runs into another train and kills a person, it seems that, whether the starting of the train be considered as a wilful or negligent act, the starter of the train is guilty of manslaughter. If the accident would not have happened if the train had not been started till its proper time the case seems clear from doubt; for there the too early starting of the train is manifestly the cause of the death; and supposing the accident would have happened had the train been started at the proper time, still the death was caused at the time when it occurred by the culpable conduct of the starter of the train; in other words, the death arose from the culpable act of the starter of the train, and sooner than it otherwise would have done, and the case seems to be very similar to those where the death of a person is accelerated by violence (*ante*, p. 34), and which establish the principle that if a man is caused by a wrongful act to die at any time earlier than he otherwise would have done, it is a case of manslaughter, and if the accelerating the death of a sick man be such an offence, it is not easy to suggest a reason why the accelerating the death of a healthy man is

not so also. It must also be observed, that in such a case all that is certain is what has actually happened; it is mere speculation what might have happened if the train had been started at its proper time: the mere shifting of the deceased from one seat to another might have saved his life. Nor is it any excuse that the train which was run into was met with at a place at which it would not have been but for the wilful or negligent act of some other person: the answer to this excuse is, that the time for starting having been fixed expressly for the purpose of preventing the *possibility* of such accidents, whether they might arise from the preceding train being met with on the line through negligence or otherwise, it does not lie in the starter's mouth to excuse his own wrongful act by such a wilful or negligent act of another. Lastly, it is submitted that the clear rule of law is, that every one who contributes by his wilful or negligent act to the death of a man is guilty of manslaughter, although there be no community of purpose or action between them, and although the act of the one may be proximate to, and the acts of the others remote from, the immediate cause of death; and that the only correct question in these cases is, whether the act did in any way whatever contribute to the death. In *R. v. Haines*, the prisoner's duty was to cause an air-heading to be put in a mine; and it was alleged to be the duty of another person to report to the prisoner that an air-heading was wanting — such totally different duties, that the neglect of either could not possibly be the joint neglect of the two parties. Now Maule, J., said, 'It has been contended that some other persons were also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner, for if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one who was negligent to say that another was negligent also, and thus, as it were, try to divide the negligence among them.' This decision is directly against there being any limitation to joint negligence or proximate negligence, and, as far as it goes, entirely supports the position above laid down. Suppose three railway

On an indictment for manslaughter against an engine-driver and fireman of a railway, it appeared that by the general rules of the company the fireman was always to follow the directions of the engine-driver, but both of them had the duty of looking out, the engineman being directed to attend to and act upon signals, the fireman obeying his directions. There was a regular system of signals, in which a red flag by day shewed that the train must stop instantly. On Ascot race day special instructions were issued, which materially differed from the regular rules, and by them the red signal did not mean, as it usually did, 'Stop,' but only 'Danger,' and that meant that the engine should proceed with caution. The rules prohibited engines from running tender foremost; but there was no turn-table at Ascot, and the engines consequently returned with their tenders foremost. The return trains were started at irregular intervals of about five minutes by the station-master and traffic manager at Ascot. One of them stopped at Egham, and about five minutes afterwards another was started from Ascot. The prisoners, who had charge of it, did not know that the preceding train would stop at Egham; the stoppage delayed it two or three minutes; when the prisoners' train passed the two stations before Egham the signal was red. There was contradictory evidence as to the pace their train went; but, after passing the auxiliary signal before reaching Egham, the speed was slackened. The prisoners' train, not having to stop at Egham, went right through the station; a minute or two afterwards the engineer saw the preceding train, and tried to stop his train, but they did not succeed in stopping the train before it ran into the other train, and caused the death of several persons. Willes, J., held that in a criminal prosecution an inferior officer must be held justified in obeying the directions of a superior not obviously improper or contrary to law; that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, these orders not appearing to him, at the time, to be improper or contrary to law. It appeared that the prisoners had nothing to do with the general management or regulation of the traffic, and their duty was to obey the special instructions issued to them as well as they could, presuming there was no apparent illegality in them :

officials each negligently turned three different sets of points at A., B., and C., and that the result was an accident and death, it is submitted that all of them would be guilty of manslaughter, provided the act of each contributed in any degree to the accident. So again, suppose A. and B. each negligently turned the points for two different trains, so that the trains were caused thereby to run into each other, can it admit of doubt that both would be responsible for the result? In *R. v. Barrett*, *ante*, p. 194, the decision turned on the defect in the indictment, which, being in the old form, contained no allegation that it was the prisoner's duty to do that which he was alleged to have neglected to do. See also *R. v. Swindall*, *ante*, p. 191; and *R. v. Longbottom*, *ante*, p. 192, as to the negligence of the deceased

forming no excuse. — C. S. G. Where a fatal railway accident had been caused by the train running off the line at a spot where rails had been taken up without allowing sufficient time to replace them, and also without giving sufficient, or, at all events, effective warning to the engine-driver; and it was the duty of the foreman of plate-layers to direct when the work should be done, and also to direct effective signals to be given: Held, that though he was under the general control of an inspector of the district, the inspector was not liable; and that the foreman was so, assuming his negligence to have been a material and substantial cause of the accident, even although there had also been negligence on the part of the engine-driver, in not keeping a sufficient look-out. *R. v. Bengé*, 4 F. & F. 504.

and in that case, provided they put the best construction they could upon them, and acted honestly in the belief that they were carrying them out, they were not criminally responsible for the result. In a civil case they might be responsible, but not criminally. As to the fireman, as he was bound to follow the direction of the engineman, there was no case. The jury then interposed, and said that they were all of opinion that there was no case of culpable negligence against either of the prisoners. Willes, J., said he was quite of the same opinion, and thought that the prisoners ought not to be convicted on a criminal charge. They had instructions of an unusual kind, and were doing their best at the time to prevent an accident; that is, they were trying to put on the brake so near to the time when, according to any view, they could be expected to have done so, that they can hardly be deemed guilty of culpable negligence. They only saw a red signal, and that, according to their special instructions, did not mean 'Stop.' There was no symptom of danger; they did not know that the other train had stopped at Egham, and they had no instructions to do so; and so they went right on, although a minute afterwards they did their best to stop the train. The arrangement was such as could not but cause imminent danger of the second train running into the first, which had passed only five or six minutes before, and had stopped three minutes at Egham. He therefore concurred in the verdict. In the course of the case, Willes, J., also held that a witness could not be asked to give an explanation as to his construction of the effect of the rules. The rules were in writing, and must speak for themselves, and the judge must declare their meaning. The special rules, if not consistent with the general rules, must override them, but their construction was for the judge. And that an officer of the Board of Trade could not be asked his opinion on the mode of conducting the traffic (which rather affected the company than the prisoners), nor whether in his judgment, as a man of experience, the driver of the engine ought to be convicted of negligence, nor (it seems) whether, in his opinion, the driver had kept a sufficient look-out ahead; but that he might be asked whether, supposing the train was going about forty miles an hour, it could have been stopped. (r)

Where on a trial for manslaughter it was stated that the deceased was the stoker on board a steam tug, of which the prisoners were the captain and engineman; the steam tug had exploded and killed the deceased whilst the prisoners, with the deceased, were the only persons on board. It was afterwards discovered that the lever of the safety valve was so tied down by weights that it could not act as a safety valve. There was therefore considerably more pressure on the boiler plates than they could bear. There was a government valve, one of the keys to the lock of which was kept by a government inspector, and the other ought to have been in possession of the captain; but there was no proof that he had the key at the time of the explosion. It was afterwards found that this valve was in such a state that it could not work. If it had been working, no mischief could have occurred. At the time of the explosion the tug was racing with a steamer, and had been so for some time. Against the

captain it was urged that he had the control of the tug, and that he was guilty of culpable neglect in not seeing that the government valve was put into working order, or in allowing the other valve to be in a state in which it could not work. As to the engineer, it was his duty to attend to the working of the engine, and he was bound to see that too much steam was not generated. Hill, J., held that there was no case for a conviction. There was a difficulty to shew that either of the prisoners were in a position to see that the government valve was out of order; and there was nothing inconsistent with the assumption that the deceased himself could see it to be out of order; and it was perfectly possible that he might have put the valve in order without the intervention of either of the prisoners; if so, it was clear that a felony could not be made out. (s)

On an indictment for manslaughter it appeared that thirteen persons embarked in a boat, besides two watermen, of whom the prisoner was one; two witnesses proved, that by the swell of a steamer in motion the boat was carried against the bows of another steamer, and that as soon as it struck the prisoner called out to the passengers to sit still, but they all jumped up and tried to lay hold of the steamer, and in consequence the boat was upset. Had the passengers remained quiet, the witnesses believed the accident would not have happened. Another witness was of opinion that the fault lay in the prisoner's pushing off the boat from the stairs with one of the oars, he standing upright at the time, instead of being seated and having the command of the sculls; he ought to have known the danger under such circumstances of crossing the strong tide that rushed through the arch of the bridge; but for his pushing off as he did, the boat would have cleared the steamer. He thought the same thing might have happened to the boat if there had been only three persons in it or only one. Williams, J.: 'If the circumstance of the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable; for he should have contemplated the danger of such a thing happening. If the fact of the prisoner standing up in the boat was the cause of the catastrophe, then it may be gross negligence on his part to have done so; because he is supposed to be acquainted with the force and velocity of the tide, and the danger of crossing it under the circumstances. On the whole, it is a question for the jury, whether the deceased met his death either by the gross carelessness of the prisoner in the management of the boat, or in taking on board a greater number of passengers than it was capable of safely carrying.' (t)

It seems that it is no defence that the deceased was guilty of contributory negligence. The sole question for the jury is, did the negligence of the prisoner materially contribute to the death of the deceased. (u) The case to the contrary is that of *R. v. Birchall*, (uu)

(s) *R. v. Gregory*, 2 F. & F. 153. The deceased might himself have weighted the other safety valve, or at least might have seen that it was so weighted.

(t) *R. v. Williamson*, 1 Cox, C. C. 97, Gurney, B., and Williams, J.

(u) See per Pollock, C. B., in *R. v.*

Swindall, *ante*, p. 191; *R. v. Haines*, *ante*, p. 195; *R. v. Walker*, 1 C. & P. 320. Per Byles, J., in *R. v. Kew*, 12 Cox, C. C. 355, and in *R. v. Hutchinson*, *ante*, p. 189; *R. v. Jones*, 11 Cox, C. C. 544.

(uu) 4 F. & F. 1087.

where Willes, J., is reported to have said that a man was not criminally responsible for negligence for which he would not be responsible in an action; but this case being cited before Lush, J., (*v*) he said that it was quite at variance with what he had always heard.

If a commoner turn out on a common, across which there are public footpaths, a horse which he knows to be vicious and dangerous, and the horse kicks and kills a child, the commoner is liable to be convicted of manslaughter, even though the child has strayed on to the common a little way off the path. (*w*)

There is one species of criminal negligence, punishable by the provisions of the statute law, which may be mentioned in this place, though the offence is not made manslaughter. By the 7 & 8 Geo. 4, c. 75 (local and personal), s. 38, in case any greater number of persons or passengers shall be taken or carried in any such wherry, boat, or other vessel (mentioned in the Act) on the river Thames (within *the limits there mentioned*), than are respectively allowed to be carried therein, and any one or more of them shall by reason thereof be drowned, every person or persons who shall work or navigate such wherry, &c., offending therein, and being convicted, shall be deemed guilty of a misdemeanor, and shall be liable to punishment, as in cases of misdemeanor, at the discretion of the Court, and shall also be disfranchised, and not allowed to work or navigate any wherry, &c., or to enjoy any of the privileges of a freeman of the company of watermen, &c., on the river Thames. (*x*)

## SEC. VI.

### *Of the Indictment and Judgment.*

The indictment for manslaughter differs from the indictment for the higher crime of murder, in the omission of any statement as to malice, and of the conclusion that the party accused did kill and 'murder;' and we have seen that a bill of indictment for murder may be converted into one for manslaughter, by striking out such statement and conclusion. (*y*)

Upon an indictment for manslaughter, it appeared that it was the prisoner's duty to attend to a steam engine, but on the occasion in question he had stopped the engine and gone away, and that, during his absence, a person came and put it in motion, and being unskilled was not able to stop it again, and in consequence of the engine being thus put in motion, the deceased was killed. Alderson, B., stopped the case, saying that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after

(*v*) *R. v. Jones, supra.*

(*w*) *R. v. Dant*, 34 L. J. M. C. 119, *et per* Blackburn, J., I by no means mean to say that the conviction might not have been supported if the child had been killed by the horse at the time when she was straying upon the common far from the public path.

(*x*) It was observed upon a former statute, 10 Geo. 2, c. 31, containing a more

severe punishment for an offence of this kind, that it might serve as a caution to stage coachmen and others, who overload their carriage for the sake of lucre, to the great danger of the lives of the passengers, the number of whom are regulated by Act of Parliament. 1 East, P. C. c. 5, s. 38, p. 264.

(*y*) *Ante*, p. 157.



the prisoner had gone away; that it is necessary, in order to a conviction for manslaughter, that the negligent act which causes the death should be that of the party charged. (z)

A., B., and C. went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B. placed a board, which was handed to him by A., in the presence of C., in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing.

One of the shots thus fired by one, though it was not proved by which one of them, killed a boy in a tree in a garden near the field at a spot distant 393 yards from the firing point. A., B., and C. were all found guilty by a jury of manslaughter. Held, by Lord Coleridge, C. J., Field, Lopes, Stephen, and Williams, JJ., that all three had been guilty of a breach of duty in firing at the spot in question without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter. (zz)

On a trial for manslaughter of a person who was burnt in a ship, where the prisoner had struck a light with a match, and lighted a candle, in a part of the ship forbidden by the ship's regulations, and had thrown down the match before it was extinguished, but a period of six hours elapsed without sign of fire by sight or smell; Bramwell, B., thought the evidence too slight to justify a conviction. (a)

Where an indictment for manslaughter stated that the prisoner 'did compel and force A. B. and C. D. to leave' a windlass, by means of which the death was occasioned, and it appeared that the prisoner, who was working one handle of the windlass, went away, and A. B. and C. D., then finding they were not strong enough to hold the windlass without him, let go their hold, by reason of which the deceased was killed, it was held that the words 'did compel and force' must be taken to mean personal affirmative force applied to A. B. and C. D., and therefore the prisoner must be acquitted. (b) So where an indictment alleged that the prisoners did 'propel and force' a vessel against a skiff, Parke, B., said, 'The allegation in the inquisition is, that the defendants forced and propelled the vessel against the skiff: evidence against those who gave the immediate orders will be necessary to sustain this allegation.' (c)

A person indicted for murder may be convicted of manslaughter, and punished accordingly, although such indictment do not conclude *contra formam statuti*. (d)<sup>1</sup>

If a person be indicted as accessory after the fact to a murder, he may be convicted as accessory after the fact to manslaughter, if the

(z) Hilton's case, 2 Lew. 214, Alderson, B. See R. v. Waters, 6 C. & P. 328, *ante*, p. 12.

(zz) R. v. Salmon, 6 Q. B. D. 79.

(a) R. v. Gardner, 1 F. & F. 669.

(b) R. v. Lloyd, 1 C. & P. 301, Garrow, B.

(c) R. v. Taylor, 9 C. & P. 672. See the case *ante*, p. 193.

(d) R. v. Chatburn, R. & M. 403. R. v. Rushworth, R. & M. 404. R. v. Berry, 1 Moo. & Rob. 463, Parke, B.

offence of the principal turns out to be manslaughter. (*f*) Either assisting the party to conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party, who knows the offence to have been committed, an accessory after the fact. (*f*)

By the 24 & 25 Vict. c. 100, s. 5, 'Whosoever shall be convicted of manslaughter shall be liable, [at the discretion of the Court,] (*g*) to be kept in penal servitude for life, [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour,] or to pay such fine as the Court shall award, in addition to or without any such other discretionary punishment as aforesaid.' (*h*)

(*f*) *R. v. Greenacre*, 8 C. & P. 35, Tindal, C. J., Coleridge and Coltman, JJ.

(*g*) The words in brackets have been repealed by the Statute Law Revision Act, 1892, as they are rendered unnecessary by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, see vol. i. p. 79) which provides that where a Court has power to award a sentence of penal servitude, the sentence may be, at the discretion of the Court, for any period not less than three years, and not exceeding either five years or any greater period authorised

by the enactment, or the Court may award imprisonment for any term not exceeding two years, with or without hard labour. The punishment imposed by the various sections of 24 & 25 Vict. c. 100, remains the same, therefore, although the actual words are in each case repealed. The power of adding solitary confinement has, however, been repealed by the Statute Law Revision Acts, and has not been reenacted.

(*h*) This clause is taken from the 9 Geo. 4, c. 31, s. 9, and 10 Geo. 4, c. 34, s. 12 (1).

## CHAPTER THE THIRD.

### OF EXCUSABLE AND JUSTIFIABLE HOMICIDE.

WE may now properly proceed to treat of such homicide as, not amounting even to manslaughter, must be considered either as excusable or justifiable; excusable when the person, by whom it is committed, is not altogether free from blame; and justifiable when no blame whatever is attached to the party killing.

*Excusable homicide* is of two sorts: either *per infortunium*, by misadventure; or *se et sua defendendo*, upon a principle of self-defence. The term *excusable* homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilty of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them: (a) and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out. At the present time, in order to prevent this expense, it is usual for the judges to permit or direct a general verdict of acquittal in cases where the death has notoriously happened by misadventure, or in self-defence. (b) There might, however, formerly have been cases so bordering upon, and not easily distinguishable from, manslaughter, that the offender might have been put to sue out his pardon, according to the provisions of the statute of Gloucester, 6 Edw. 1, c. 9; (c) but that statute was repealed by the 9 Geo. 4, c. 31; and the 24 & 25 Vict. c. 100, s. 7, enacts, that 'No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony.'

*Justifiable homicide* is of several kinds: as it may be occasioned by the performance of acts of unavoidable necessity, where no shadow of blame can be attached to the party killing; or by acts done by the permission of the law, either for the advancement of public justice, or for the prevention of some atrocious crime.

(a) 4 Blac. Com. 188. The penalty for this offence is said by Sir Edward Coke to have been anciently no less than death, 2 Inst. 148, 315; but this is denied by other

writers, 1 Hale, P. C. c. 425. 1 Hawk. P. C. c. 29, s. 20, *et seq.* Fost. 282.

(b) 4 Blac. Com. 188. Fost. 288. 1 East, P. C. c. 5, s. 8, p. 222.

(c) Fost. 289.

## SEC. I.

*Of Excusable Homicide by Misadventure.*

Homicide by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. (*d*) The act must be lawful; for if it be unlawful, the homicide will amount to murder, or manslaughter, as has been already shewn: (*e*) and it must not be done with intention of great bodily harm; for then the legality of the act, considered abstractedly, would be no more than a mere cloak, or pretence, and consequently would avail nothing. The act must also be done in a proper manner, and with due caution to prevent danger. (*f*)

Thus, if people, following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately, to kill any one, such killing will be homicide by misadventure. (*g*) See *ante*, p. 139. Thus where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused. (*h*) In a case where a person was riding a horse, and the horse, being whipped by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse. (*i*)

It has been shewn, that where parents, masters, and other persons, having authority *in foro domestico*, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the circumstances: (*j*) but if the correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure. (*k*)

As to its being excusable homicide when death accidentally happens to the person killed whilst engaged in a lawful sport, see *ante*, p. 180.

(*d*) 1 East, P. C. c. 5, s. 8, p. 221, and s. 36, pp. 260, 261. Fost. 258. 1 Hawk. P. C. c. 29, s. 1.

(*e*) *Ante*, p. 121, 173.

(*f*) 1 East, P. C. c. 5, s. 36, p. 261.

(*g*) 1 Hale, 472, 475. 1 Hawk. P. C. c. 29, ss. 2 & 4. Fost. 262. 1 East, P. C. c. 5, s. 38, p. 262.

(*h*) Fost. 263. 1 Hale, 476. O. B. Sess. before Mich. T. 1704. MS. Tracy, 32. 1 East, P. C. c. 5, s. 38, p. 263.

(*i*) 1 Hawk. P. C. c. 29, s. 3.

(*j*) *Ante*, p. 134.

(*k*) 1 Hale, 464, 478, 474. 4 Blac. Com. 182.

## SEC. II.

*Of Excusable Homicide in Self-Defence.*<sup>1</sup>

Homicide in self-defence is a sort of homicide committed *se et sua defendendo*, in defence of a man's person or property, upon some sudden affray, considered by the law as in some measure blamable, and barely excusable. (*l*)

When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death. (*m*) Under such circumstances, the killing will be excusable self-defence, sometimes expressed in the law by the word *chance medley*, or (as it has been written by some) *chaud medley*, the former of which, in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import: but the former has, in common speech, been often erroneously applied to any manner of homicide by misadventure; whereas it appears by one of the statutes, (*n*) and the ancient books, (*o*) that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. (*p*)

Homicide upon chance medley borders very nearly upon manslaughter; and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. (*q*) In both cases it is supposed that passion has kindled on each side, and blows have passed between the parties; but in the case of manslaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. (*r*) And the true criterion between them is stated to be this: when both parties are actually combating, at the time the mortal stroke was given, the slayer is guilty of man-

(*l*) Fost. 273. 'Self-defence culpable, but through the benignity of the law excusable.'

(*m*) 1 East, P. C. c. 5, s. 51, p. 280. Fost. 273.

(*n*) 24 Hen. 8, c. 5.

(*o*) Staund. P. C. 16. 3 Inst. 55, 57. Kel. 67.

(*p*) 4 Blac. Com. 184. Fost. 275. *Skene De verborum significatione*, Verb. Chaudmelle.

(*q*) Fost. 276.

(*r*) Fost. 277.

## AMERICAN NOTE.

<sup>1</sup> In America, homicide in self-defence would seem to be excusable where there is a reasonable apprehension of death or great

personal violence. *Holmes v. S.*, 23 Ala. 7. *Noles v. S.*, 26 Ala. 31. See however *P. v. Shorter*, 4 Barb. 460.

slaughter; but if the slayer has not begun to fight, or, having begun, endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. (s)

In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and, from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood.<sup>1</sup> For in no case will a retreat avail, if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage. (t) The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or great bodily harm, and then, in his defence, he may kill his assailant instantly. (u) Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary, to protect his own life, or to protect himself from such serious bodily harm, as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified. (v)

Where the prisoner levelled a gun at the deceased, and it was a question whether the gun went off accidentally or not, Cockburn, C. J., left the following questions to the jury:—1. Was the discharge of the gun intentional or accidental. (a) If intentional, was it from ill feeling to the deceased, or desire to get rid of him? in which case it would be murder. (b) If it was not so done, was it done by the prisoner in self-defence, and to protect himself from death or serious bodily harm intended towards him by the deceased? or (c) from the reasonable apprehension of it induced by the words and conduct of the deceased, though the latter may not, in fact, have intended death or serious injury? (d) If not so, was it done after an assault made by the deceased on the prisoner, though short of an assault calculated to kill or cause serious bodily injury? or (e) was it done under such a degree of alarm and bewilderment of mind, caused by the conduct of the deceased, as to deprive the prisoner, for

(s) 4 Blac. Com. 184.

(t) 1 Hale, 481, 483. Fost. 277. 4 Blac. Com. 185.

(u) 1 Hale, 483. 4 Blac. Com. 185.

(v) Per Bosanquet, J., *R. v. Smith*, 8 C. & P. 160, *præsentibus*, Bolland, B., and Coltman, J. See *R. v. Bull*, 9 C. & P. 22.

#### AMERICAN NOTE.

<sup>1</sup> As to retreating, see *Haynes v. S.*, 17 Ga. 465. *P. v. Sullivan*, 3 Seld. 396. *Stew. art v. S.*, 1 Ohio St. 66. *Runyan v. S.*, 57 Ind. 80. *Erwin v. S.*, 29 Ohio St. 186.

the time, of his reason and power of self-control? or (f) was the effect of the language and conduct of the deceased such as to provoke the angry passions of the prisoner so as to deprive him of his reason and power of self-control? 2. If the discharge of the gun was accidental, in which case the prisoner cannot be convicted of murder, but may be of manslaughter. (a) Was the gun levelled by the prisoner at the deceased in self-defence against an attack of the deceased endangering life or limb, or reasonably apprehended by the prisoner as likely to do so, in either of which cases the prisoner would be entitled to an acquittal, or (b) was the gun levelled by the prisoner at the deceased unnecessarily under the circumstances, but without the intention of discharging it, in which case it would be manslaughter. (vv)

If A. challenges B. to fight, and B. declines the challenge, but lets A. know that he will not be beaten, but will defend himself; and then B., going about his business and wearing his sword, is assaulted by A., and killed; this is murder in A. But if B. had killed A. upon that assault, it had been *se defendendo*, if he could not otherwise have escaped; or bare manslaughter, if he could have escaped and did not. (w)

The law appears to be that if the blow, from the effect of which the deceased died, was given purely in self-defence, as distinguished from a desire to fight, it is excusable, and it is a question for the jury whether the prisoner struck the blow in self-defence, or whether he really desired to fight. (ww)

As in the case of manslaughter upon sudden provocation, where the parties fight upon equal terms, all malice apart, it matters not who gave the first blow: so in the case of excusable self-defence, it seems that the first assault in a sudden affray, all malice apart, will make no difference, if either party quit the combat and retreat, before a mortal wound be given. (x) According to this doctrine, if A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and *bonâ fide* flies, and being driven to the wall, turns again upon B. and kills him, this will be *se defendendo*: (y) but some writers have thought this opinion too favourable, inasmuch as the necessity to which A. is at last reduced, originally arose from his own fault. (z) With regard to the nature of the necessity, it may be observed, that the party killing cannot, in any case, substantiate his excuse, if he kill his adversary even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself. (a)

(vv) R. v. Weston, 14 Cox, C. C. 346.

(w) 1 Hale, 453.

(ww) R. v. Knock, 14 Cox, C. C. 1.

(x) Fost. 277.

(y) 1 Hale, 482.

(z) 1 Hawk. P. C. c. 29, s. 17. Lord Hale seems also to distinguish the case of him who is first attacked from the assailant, with respect to the point of retreating, 1 Hale, 482. Upon this subject some remarks are offered by Mr. East (1 East, P. C. c. 5, s. 53, pp. 281, 282), and he concludes by

saying, 'At any rate I think there is great difficulty in applying the distinction taken by Lord Hale and Hawkins against him who makes the first assault, to the case of mutual combat by consent, though upon a sudden occasion, where neither of the parties makes an attack till the other is prepared; because in these cases it matters not who gives the first blow; it forms no ingredient in the merits of the question.'

(a) Fost. 273, 275, 289. 4 Blac. Com. 184.

Under the excuse of self-defence, the principal civil and natural relations are comprehended: therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other, respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. (*b*)

So where a son shot and killed his father, who was assaulting his mother, Lopes, J., told the jury that if the accused had reasonable grounds for believing, and honestly believed that his mother's life was in imminent peril, and that the shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused from the consequences of the homicide. (*bb*)

If A., in defence of his house, kill B., a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter; unless, indeed, there were danger of his life. But if B. enter into the house, and A., having first requested him to depart, gently lay his hands upon him to turn him out, and then B. turn upon him and assault him, and A. then kill him, it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession. (*c*) And it seems, that in such a case A., being in his own house, need not fly as far as he can, as in other cases of *se defendendo*; for he has the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by his flight. (*d*) See further as to this, *ante*, p. 48.

There is one species of homicide *se defendendo* where the party slain is equally innocent as the person who occasions his death: and yet this homicide is also excusable, from the great universal principle of self-preservation, which prompts every man to save his own life, in preference to that of another, where one of them must inevitably perish.<sup>2</sup> Of this kind is the case mentioned by Lord Bacon, where upon two persons being shipwrecked, and getting on the same plank, one of them, finding it not able to save them both,

(*b*) 1 Hale, 484. 4 Blac. Com. 186.

(*bb*) R. v. Rose, 15 Cox, C. C. 540.<sup>1</sup>

(*c*) 3 Edw. 3. Coron. 35. Crompt. 27 *b*.  
1 Hale, 486.

(*d*) 1 Hale, 485. In Dakin's case, 1 Lew. 166, where the prisoner was a lodger at a house, to which there was a back-way, of which the prisoner was ignorant, it being the first night he had lodged at the house, and some persons split open the door of the house in order to get the prisoner out and ill-treat him; Bayley, J., is reported to have said, 'If the prisoner had known of the

back-way, it would have been his duty to have gone out backwards, in order to avoid the conflict.' But it is submitted that the protection of the house extends to each and every individual dwelling in it. In R. v. Cooper, Cro. C. 544, it was held that a lodger might justify killing a person endeavouring to break into the house where he lodged with intent to commit a felony in it; and see 1 East, P. C. c. 5, s. 57, p. 289. Fost. 274, and Ford's case, Kel. 51. Post, p. 215. C. S. G.

#### AMERICAN NOTES.

<sup>1</sup> In an American case the judge charged the jury that if they thought the prisoner really believed that the deceased had power to kill his wife by supernatural means, and that such belief was reasonable in him under the circumstances, he might be acquitted. T. v. Fisk, cited in Bishop, i. s. 305, note 3, ii. s. 645 (3).

<sup>2</sup> In America, it has been held that seamen have no right to sacrifice the lives of passengers to preserve their own, and if it is necessary for the preservation of the remainder that part should be sacrificed, a decision by lot should be resorted to. U. S. v. Holmes, 1 Wallace, Jr. 1.



thrust the other from it, whereby he was drowned. (e) But it has now been held that a man who in order to escape death from hunger kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes, and has reasonable ground for believing, that it affords the only chance of preserving his life.

At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners, D. and S., seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat, that the boat was drifting on the ocean, and was probably more than a thousand miles from land; that on the eighteenth day, when they had been seven days without food, and five without water, D. proposed to S. that lots should be cast who should be put to death to save the rest, and they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D., with the assent of S., killed the boy, and both D. and S. fed on his flesh for four days; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then, or very soon, fed upon the boy, or one of themselves, they would die of starvation:—Held that upon these facts, there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder. (ee)

But, according to Lord Hale, a man cannot even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life, if he do not comply; so that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance. (f) But upon this it has been observed, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, (g) there seems to be no reason why homicide may not also be mitigated upon the like consideration, of human infirmity: though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder. (h)

It should further be observed that, as the excuse of self-defence is

(e) 4 Blac. Com. 186. Bac. Elem. c. 5. 1 Hawk. P. C. c. 28, s. 26.

(ee) *R. v. Dudley and Stephens*, 14 Q. B. D. 273.<sup>1</sup> The case was tried at the Exeter Assizes, and a special verdict returned. The Assizes were then adjourned to the Royal Courts of Justice. The record was brought into court, and filed, and the arguments were heard by the judges not as commissioners of assize but as judges of the High Court. The prisoners were sentenced to death by the Court, but the sentence was commuted by the Crown to

six months imprisonment. See an interesting note on this case by Sir J. F. Stephen, *Digest of Criminal Law*, 4th ed. p. 24.

(f) 1 Hale, 51, 484.

(g) 1 East, P. C. c. 2, s. 15, p. 70, and the authorities there cited.

(h) 1 East, P. C. c. 5, s. 61, p. 294. Lord Hale says that in the most extreme case, where there could be no recourse to law, the person assailed ought rather to die himself than kill an innocent person.

#### AMERICAN NOTE.

<sup>1</sup> This case, in the opinion of Mr. Bishop, should have ended in a verdict of manslaughter. *Bishop*, i. 348 (n).

founded on necessity, it can in no case extend beyond the actual continuance of that necessity, by which alone it is warranted: (i) for if a person assaulted does not fall upon the aggressor, till the affray is over, or when he is running away, this is revenge, and not defence. (j)

## SEC. III.

*Of Justifiable Homicide.*

It has been already stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the permission of the law. (k)

Amongst the acts of unavoidable necessity may be classed the execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country. These are acts of necessity, and even of civil duty: and, therefore, not only justifiable, but commendable, where the law requires them. (l) But the law must require them, otherwise they are not justifiable; and, therefore, wantonly to kill the greatest of malefactors, would be murder; and we have seen that all acts of official duty should, in the nature of their execution, be conformable to the judgment by which they are directed. (m)

Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable. (n) A rule founded in reason and public utility; for few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest were obliged to desist, and leave the business undone; and a case in which the officer was holden guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being retaken, (o) seems to stand alone, and has been mentioned with disapprobation. (p) As to the authority of constables and other persons to arrest, see *ante*, p. 70.

(i) 1 East, P. C. c. 5, s. 60, p. 293.

(j) 4 Blac. Com. 293.

(k) *Ante*, p. 205.

(l) Fost. 267. 1 Hale, 496, 502. 4 Blac. Com. 178.

(m) *Ante*, p. 133, and see 1 Hale, 501. 2 Hale, 411.

(n) 1 Hale, 494. 1 Hawk. P. C. c. 28. ss. 17, 18, 12. Fost. 270. 4 Blac. Com. 179, 1 East, P. C. c. 5, s. 74, p. 307.

(o) 1 Roll. Rep. 189.

(p) Fost. 271. 1 East, P. C. c. 5, s. 74, p. 307.

As to an officer killing a person flying from arrest, see *ante*, pp. 71, 129.

In the case of a riot or rebellious assembly, the peace officers and their assistants, endeavouring to disperse the mob, are justified, both at common law and by the Riot Act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed. (*q*) And it has been said, that perhaps the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorised by the law to arm himself for the preservation of the peace. (*r*)

Gaolers and their officers are under the same special protection as other ministers of justice; and, therefore, if in the necessary discharge of their duty they meet with resistance, whether from prisoners in civil or criminal suits, or from others, in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and if the party so resisting happen to be killed, this, on the part of the gaoler, or his officer, or any person coming in aid of him, will be justifiable homicide. (*s*)

Sir William Hawkesworth, being weary of life, and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, he was shot by the keeper. This was decided to be excusable homicide by the statute *De malefactoribus in parcia*. (*t*)

A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours, by violence or surprise, to commit a known felony upon either.<sup>1</sup> In these cases he is not obliged to retreat, but may pursue his

(*q*) 1 Hale, 53, 494, 495, MS. Tracy, 36, cited 1 East, P. C. c. 5, s. 71, p. 304. Riot Act, 1 Geo. 1, st. 2, c. 5, where persons continue together an hour after proclamation. And see vol. i. p. 553, *et seq.*

(*r*) 1 Hawk. P. C. c. 28, s. 14, and see Fost. 272; Poph. 121. It was so resolved by all the judges in Easter Term, 39 Eliz., though they thought it more discreet for every one in such a case to attend and assist the King's officers in preserving the peace. And certainly, if private persons interfere to suppress a riot, they must give notice of their intention.

(*s*) Fost. 321. 1 Hale, 481, 496.

(*t*) 1 Hale, 40. By the 21 Edw. 1, st. 2, if a forester, parker, or warrenor, found any trespassers wandering within his liberty,

intending to do damage therein, who would not yield, after hue and cry made to stand unto the peace, but continued their malice, and disobeying the King's peace, did flee or defend themselves with force and arms, if such forester, parker, or warrenor, or their assistants, killed such offenders, either in arresting or taking them, they should not be troubled for the same, nor suffer any punishment. The 21 Edw. 1, st. 2, was repealed by the 7 & 8 Geo. 4, c. 27, and 9 Geo. 4, c. 53. And the 3 & 4 Will. & M. c. 10, by the 16 Geo. 3, c. 30, and the 4 & 5 Will. & M. c. 23, by the 7 & 8 Geo. 4, c. 27, and the 1 & 2 Will. 4, c. 32. All further reference to their provisions has therefore been omitted. C. S. G. See *ante*, p. 140.

#### AMERICAN NOTE.

<sup>1</sup> See *S. v. Harris*, 1 Jones (Law), 190. *Dill v. S.*, 25 Ala. 15. *Dyson v. S.*, 26 Miss. 362. *M'Pherson v. S.*, 22 Ga. 473. *Mitchell v. S.*, *ibid.* 211. As to intervention to pre-

vent a breach of the peace, see *P. v. Cob*, 4 Parker, C. R. 35. *Pond v. P.*, 8 Mich. 150. *Johnston's case*, 5 Gratt. 660. A person assaulted by another who has threatened

adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. (u) But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets. (v) It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not be left in doubt; so that if A. make an attack upon B., it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, &c.) that the life of B. is in imminent danger; otherwise his killing the assailant will not be justifiable self-defence. (w) There must be an intention on the part of the person killed to rob, or murder, or to do some dreadful bodily injury to the person killing; or the conduct of the party must be such as to render it necessary on the part of the party killing to do the act in self-defence. (x) And the rule clearly extends only to cases of felony; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him, so far as to make him desist, yet if he kill him, it is manslaughter. (y) But if a house be broken open, though in the day-time, with a felonious intent, it will be within the rule. (z) A person who is set to watch a yard or garden by his master, is not justified in shooting any one who comes into it in the night, even if he see him go into his master's hen-roost, and some dead fowls and a crow-bar be found near him; but if from his conduct he has fair ground to believe his own life in actual danger, he is justified in shooting him. (a)

Important considerations will arise in cases of this kind, as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. One Levet was indicted for killing F. F., under the following circumstances:—Levet

(u) *Fost.* 273. *Kel.* 128, 129. 1 *Hale*, 445, 481, 484, *et seq.* 1 *Hawk.* P. C. c. 28, ss. 21, 24. *R. v. Bull*, 9 C. & P. 22.

(v) 1 *Hale*, 488. 4 *Blac. Com.* 180. 'But if one pick my pocket, and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons.' 1 *East*, P. C. c. 5, s. 45, p. 273.

(w) 1 *Hale*, 484.

(x) *R. v. Bull*, 9 C. & P. 22, *Vaughan and Williams*, JJ.

(y) 1 *Hale*, 485, 486. 1 *Hawk.* P. C. c. 28, s. 23. *Kel.* 132. 1 *East*, P. C. c. 5, s. 44, p. 272.

(z) 1 *East*, P. C. c. 5, s. 44, p. 273. In

4 *Blac. Com.* 180, it is said that the rule reaches not to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery also. But it will apply where the breaking is such as imports an apparent robbery, or an intention or attempt of robbery. 1 *Hale*, 488.

(a) *R. v. Scully*, 1 C. & P. 319, *Garrow, B.* The 24 *Hen.* 8, c. 5, by which persons killing those who were attempting to rob or murder, or commit burglary, were not to suffer any forfeiture of goods, &c., but to be fully acquitted, and which was here referred to in the second edition, was repealed by the 9 *Geo.* 4, c. 31. C. S. G.

to kill him is not as of course required to run away, thus increasing his danger by encouraging his assailant to repeat the attempt when he cannot so well resist. *Bohannon v. C.*, 8 *Bush*, 481; 8 *Am. R.* 474. *Phipps v. C.*, 2 *Duv.* 328; 87 *Am. D.* 499. *Tweedy v. S.*, 5 *Iowa*, 433. *Dolan v. S.*, 81 *Ala.* 11. *P. v. Gonzales*, 71 *Cal.* 569. *West v. S.*, 2 *Tex. Ap.* 460. See also *S. v.*

*Mullen*, 14 *La. An.* 570. *Pfomer v. P.*, 4 *Par. Cr.* 558. *Aaron v. S.*, 31 *Ga.* 167. *C. v. Carey*, 2 *Brews.* 404. *Lingo v. S.*, 29 *Ga.* 470. *S. v. Kennedy*, 91 *N. C.* 572. *Jones v. S.*, 76 *Ala.* 8. *Duncan v. S.*, 49 *Ark.* 543. *S. v. Dixon*, 75 *N. C.* 275. *Erwin v. S.*, 29 *Ohio St.* 186; 23 *Am. R.* 733. *Stoffer v. S.*, 15 *Ohio St.* 47; 86 *Am. D.* 470. *Ingram v. S.*, 67 *Ala.* 67.

being in bed and asleep, his servant, who had procured F. F. to help her about the work of the house, and went to the door about twelve o'clock at night to let her out, conceived that she heard thieves about to break into the house: upon which she ran to him, and told him of what she apprehended. Levet arose immediately, took a drawn sword, and, with his wife, went down stairs; when the servant, fearing that her master and mistress should see F. F., hid her in the buttery. Levet with his sword searched the entry for thieves, when his wife, spying F. F. in the buttery, and not knowing her, conceived her to be a thief, and cried out to her husband in great fear, 'Here they be that would undo us;' when Levet, not knowing that it was F. F. in the buttery, hastily entered with his drawn sword, and being in the dark, and thrusting before him with his sword, thrust F. F. under the left breast, and gave her a mortal wound, of which she instantly died. (b) This was ruled to be misadventure; but a great judge appears to have thought the decision too lenient, and that it would have been better ruled manslaughter; due circumspection not having been used. (c) Upon this opinion, however, some observations have been made; and it has been ably argued, upon the peculiar facts and circumstances of the transaction, that the case seems more properly to be one of those mentioned by Lord Hale, (d) where the ignorance of the fact excuses the party from all sort of blame. (e) And in another book of great authority, the case is mentioned as one in which the defendant might have justified the fact under the circumstances, on the ground that it had not the appearance even of a fault. (f)

Questions will also sometimes arise as to the apparency of the intent in one of the parties to commit such felony as will justify the other in killing him. Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword, upon which Mr. Cope returned a bottle with equal violence; (g) and it was held that this was lawful and justifiable on the part of Mr. Cope, on the ground that he that has manifested malice against another, is not fit to be trusted with a dangerous weapon in his hand. (h) There seems to have been good reason for Mr. Cope to have supposed that his life was in danger: and it was probably on the same ground that the judgment on Ford's case proceeded. Mr. Ford being in possession of a room at a tavern, several persons insisted upon having it, and turning him out, which he refused to submit to; thereupon they drew their swords upon Mr. Ford and his company, and Mr. Ford drew his sword, and killed one of them; and this was adjudged justifiable homicide. (i) For if several attack a person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassina-

(b) Levet's case, Cro. Car. 538. 1 Hale, 42, 474. Jones (W.) 429.

(c) Fost. 299.

(d) 1 Hale, 42.

(e) 1 East, P. C. c. 5, s. 46, pp. 274, 275.

(f) 1 Hawk. P. C. c. 28, s. 27.

(g) Mawgridge's case, Kel. 128, 192, ante, p. 61.

(h) By Lord Holt, Kel. 128, 129.

(i) Ford's case, Kel. 51.

tion than of combat. (*j*) But no assault, however violent, will justify killing the assailant under the plea of necessity, unless there be a plain manifestation of a felonious intent. (*k*) And it may be further observed, that a man cannot, in any case, justify killing another by a pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself; for, if he kill any person in defence of an injury done by himself, he is guilty of manslaughter at least; as in the case where a body of people wrongfully detained a house by force, and killed one of those who attacked it, and endeavoured to set it on fire. (*l*)

Foster, J., was of opinion, that, upon the same principle upon which Mawgridge's case was decided, and possibly upon the rule touching the arrest of a person who has given a dangerous wound, the legislature, in the case of the Marquis de Guiscard, who stabbed Mr. Harley sitting in Council, discharged the parties who were supposed to have given the Marquis the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action. (*m*)

Where a known felony is attempted upon any one, not only the party assaulted may repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief; and if death ensue, the party so interposing will be justified. (*n*)

But, in cases of mutual combats or sudden affrays, a person interfering should act with much caution. Where, indeed, a person interferes between two combatants with a view to preserve the peace, and not to take part with either, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable; (*o*) but, in general, if there be an affray and an actual fighting and striving between persons, and another run in, and take part with one party, and kill the other, it will not be justifiable homicide, but manslaughter. (*p*)

It should be observed, that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified, unless the necessity continue to the time when the party is killed. Thus, though the person upon whom a felonious attack is first made be not obliged to retreat, but

(*j*) 1 East, P. C. c. 5, s. 47, p. 276; and see 1 East, P. C. c. 5, s. 25, p. 243, where Ford's case is observed upon; and it is said that the memorandum in the margin of Kelyng to inquire of this case, and the *quære* used by Foster, J., in citing it, were probably made on the ground of the reason suggested in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford in defence of his own possession of the room was justifiable, which, under those circumstances, might be fairly questioned: as, on that ground, it might have been better ruled to be manslaughter.

(*k*) 1 East, P. C. c. 5, s. 47, p. 277.

(*l*) 1 Hawk. P. C. c. 28, s. 22. 1 Hale, 405, 440, 441.

(*m*) 9 Ann c. 16, which was repealed by the 9 Geo. 4, c. 31. Foster, 275.

(*n*) 1 Hale, 481, 484. Foster, 274. And in *Handcock v. Baker* and others, 2 Bos. & Pul. 265. Chambre, J., said, 'It is lawful for a private person to do anything to prevent the perpetration of a felony.'

(*o*) 1 Hale, 484. 1 East, P. C. c. 5, s. 58, p. 290.

(*p*) 1 East, P. C. c. 5, s. 58, p. 291. *Ante*, p. 674; and see also vol. i. p. 587, *et seq.*

may pursue the felon till he finds himself out of danger ; yet if the felon be killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder ; though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation. (q)

(q) 1 East, P. C. c. 5, s. 60, p. 293. 4 Blac. Com. 185. 1 Hale, 485.

## CHAPTER THE FOURTH.

### OF DESTROYING INFANTS IN THE MOTHER'S WOMB.

WE have already seen that an infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder. (a) An attempt, however, to effect the destruction of such an infant, though unsuccessful, appears to have been treated as a misdemeanor at common law. (b)

By 24 & 25 Vict. c. 100, s. 58, 'Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child,<sup>1</sup> shall unlawfully (c) administer to her or cause to be taken by her any poison or other noxious thing, (d) or shall unlawfully (e) use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (f) to be kept in penal servitude for life, [or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.'](g)

Sec. 59. 'Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be

(a) *Ante*, p. 6.

(b) See a precedent of an indictment for this offence as a misdemeanor at common law in 3 Chit. Crim. Law, 798, procured from the Crown Office, Mich. T. 42 Geo. 3.

(c) The word 'maliciously' was in the 9 Geo. 4, c. 31, s. 13.

(d) The words of the 43 Geo. 3, c. 58, in s. 1, were 'any deadly poison or other noxious and destructive substance or thing;' in sec. 2, 'any medicines, drug, or other substance or thing whatsoever.' The words in the 9 Geo. 4, c. 31, where the woman was quick with child, were, 'any poison or other noxious thing.' Where the woman was not quick with child, 'any medicine or other thing.' See note (i), *post*, p. 219.

(e) 'Unlawfully' was not in the 9 Geo. 4, c. 31, s. 13.

(f) The words in brackets are repealed, but the punishment except as to solitary confinement remains the same, see *ante*, p. 204, note (g).

(g) This clause is framed on the 7 Will. 4 and 1 Vict. c. 85, s. 6. The first part of it is new, and extends the former enactment to any woman, who, being with child, attempts to procure her own miscarriage. The second part in terms makes it immaterial whether the woman were or were not with child, in accordance with the decision in *R. v. Goodhall*, 1 Den. C. C. 187; *S. C.* as *R. v. Goodchild*, 2 C. & K. 293.

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#### AMERICAN NOTE.

<sup>1</sup> In America, there is no offence at common law unless the woman is pregnant. *C. v. Parker*, 9 Metc. 263. *C. v. Bangs*, 9 Mass. 387. *Wilson v. Ohio*, 2 Ohio N. s. 319. *S. v. Howard*, 32 Verm. 380. *Mitchell v. C.*, 78 Ky. 704, but in many States it is

a statutory offence. See *C. v. Wood*, 11 Gray, 85. *S. v. Howard*, 32 Vt. 380. *P. v. Davis*, 56 N. Y. 95. *Willey v. S.*, 46 Ind. 363. *S. v. Van Houten*, 37 Mo. 357. *S. v. Fitzgerald*, 49 Iowa, 260.



or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, [at the discretion of the Court] (*h*) to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.] (*i*)

The 43 Geo. 3, c. 58, and the 9 Geo. 4, c. 31 (now repealed), made an important distinction between the case where the woman was quick with child, and where she was not quick with child. (*j*) Under the present Act, however, in the case of the mother, all that it is necessary to prove is that she was with child, and in the case of any other person, it is immaterial whether the woman were or were not with child.

It was held, on the 43 Geo. 3, c. 58, s. 2, that unless the woman were with child, the offence was not committed, although the prisoner thought she was with child, and administered the drug with intent to destroy the child. (*k*)

An indictment upon the 43 Geo. 3, c. 58, s. 2, charged the prisoner with having administered to a woman a *decoction* of a certain shrub called *savin* : and it appeared upon the evidence that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub. The medical men who were examined stated, that such a preparation is called an *infusion*, and not a *decoction* (which is made by boiling the substance in the water), upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed. But Lawrence, J., overruled the objection, and said, that infusion and decoction are *ejusdem generis*, and that the variance was immaterial : that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion ? (*l*)

On an indictment for administering feverfew and other drugs to procure abortion, it appeared that the prisoner gave the woman, who was alleged to be with child by him, two powders, with directions to take one on each of two successive nights, and said that the effect would be to cause miscarriage. She took one of the powders, with the feverfew, which brought on violent sickness. The other

(*h*) The words in brackets are repealed, but the punishment remains the same, see *ante*, p. 204, note (*g*).

(*i*) This clause is new. It is intended to check the obtaining of poison, &c., for the purpose of causing abortion, by making both the person who supplies and the person who procures it guilty of a misdemeanor. See sec. 68 as to the trial of offences committed within the Admiralty jurisdiction.

(*j*) As to where a woman was quick with child, see *R. v. Phillips*, 3 Campb. 77.

(*k*) *R. v. Scudder, R. & M.*, C. C. R. 216. S. C. 3 C. & P. 605.

(*l*) *R. v. Phillips*, 3 Campb. 74. And in *R. v. Coe*, 6 C. & P. 403, where the prisoner was indicted on the 9 Geo. 4, c. 31, s. 13, for administering saffron to a female, and his counsel was cross-examining as to her having taken something else before the saffron, and also as to the innoxious nature of the article ; Vaughan, B., said, 'Does that signify ? It is with the intention that the jury have to

do ; and if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient.' It is not stated upon which branch of the section this indictment was framed ; if upon the latter, which used the words 'any medicine or other thing,' perhaps the dictum was right. But it should seem that neither this dictum, nor that of Lawrence, J., in *R. v. Phillips*, apply to the new Act, which uses the words 'any poison or other noxious thing' only, in the case of administering or causing to be taken ; and although a doubt has been suggested in a note to *R. v. Coe* as to whether the words 'other means' might not be applied to other substances than such as are poisonous or noxious ; it should seem that the words 'other means' cannot be so applied in the new Act : first, because they are in an entirely distinct sentence ; secondly, because they are governed by the word use, and not by administer. See *Rosc. Cr. Evid.* 243. C. S. G.

powder was examined by a physician, and he could not discover any mineral substance in it; as far as he could judge from the taste, smell, and appearance, it was a mixture of savin and fennigreek, the latter being the larger ingredient. The fennigreek would scarcely produce any effect at all; savin, in that quantity, might produce a little disturbance in the stomach for the time, but would do no further injury. Feverfew (*m*) is an herb very similar to camomile: it is a tonic in common use among the peasantry, and has nothing noxious in it. A mixture of the powder and decoction of this herb would not alter the properties of either. The prisoner upon two or three subsequent occasions had brought the woman other medicines to take for the same purpose, some of which she had taken, but not the rest. Wilde, C. J., held that the evidence was not sufficient to prove that the drugs administered came within the meaning of the words 'poison or other noxious thing.' (*n*)

Where the prisoner caused half an ounce of oil of juniper to be administered, and it was proved that quantities considerably less may be taken without any ill effect, but that half an ounce produces ill effects and is dangerous to a pregnant woman, it was held that there was evidence of the administering of a 'noxious thing' within the section. (*nn*)

In order to bring a case within the 24 & 25 Vict. c. 100, s. 59, it is not necessary that the intention of using the noxious substance should exist in the mind of any other person than the person supplying it. The prisoner was indicted for supplying savin, knowing that it was intended to be unlawfully used to procure a miscarriage, and it was contended that there was no case against him, because it was necessary that he should know that the savin was intended to be used with intent to procure the miscarriage, whereas it was not

(*m*) The proper name of this is *matricaria*, so called from its supposed use in disorders of the womb. — *Edinb. Med. & Phys. Dict.*<sup>1</sup>

(*n*) *R. v. Perry*, 2 Cox, C. C. 223. Wilde, C. J., also held that the other transactions were admissible as shewing the intent with which the particular drugs referred to in the indictment were administered. See *R. v. Calder, post*. As the prisoner administered the drugs with intent to procure a miscarriage, and as savin is unquestionably in its nature a noxious drug, the decision in this case seems open to great doubt. It is submitted that the true meaning of the words 'poison or other noxious thing' is such things as in their nature are poisonous or noxious; and that it is a misapprehension to suppose that the statute requires such a quantity of a poison or other noxious thing

to be administered as shall be noxious. If a person administers any quantity of a poison, however small, it has never yet been doubted, that, if it were done with intent to murder, the offence of administering poison with intent to murder was complete; and *R. v. Cluderoy*, 1 Den. C. C. 514, *post*, which was decided after this case, shews that if poison be administered in such a way that it cannot injure, the offence is nevertheless complete; and Wilde, C. J., there said, 'the act of administering poison with intent to kill is proved. The effect of that act is beside the question.' It is submitted, therefore, that if there be an intent to procure abortion, it is quite immaterial how small the quantity be of the poison or other noxious thing that is administered. C. S. G. And see *R. v. Cramp*, 5 Q. B. D. 307.

(*nn*) *R. v. Cramp*, 5 Q. B. D. 307.

#### AMERICAN NOTE.

<sup>1</sup> It would seem that in America administering something which is believed to be poisonous, but is not so, will not be an attempt to poison even although the person to whom it is administered dies. *S. v. Clarissa*,

11 Ala. 57, but Mr. Bishop doubts if this is law, see Bishop, i. s. 756. If, on the other hand, the prisoner administers a drug which he knows will do no harm he has not the intention to poison. Bishop, i. s. 769.

intended, except by the prisoner himself, to be so used ; the jury found that the case was in other respects proved, but that the prosecutrix did not intend to take the savin, nor did any other person, except the prisoner, intend that she should take it, but, upon a case reserved, it was held that the intention of any other person than the prisoner was not necessary to the commission of the offence. The statute is directed against the supplying of any substance with the intention that it shall be employed in procuring abortion. The prisoner, in this case, supplied the substance, and intended that it should be employed to procure abortion. He knew of his own intention that it should be so employed, and was therefore within the words of the statute. He was also within the mischief of the statute, and was rightly convicted. (o)

The thing supplied with intent to procure abortion must be noxious in its nature. Where, therefore, an indictment charged the prisoner with supplying a certain noxious thing with intent to procure abortion, and a surgeon proved that the liquid was some vegetable decoction of a harmless character, and such as would not procure a miscarriage ; but if taken with the belief that it would produce it, it might, by acting on the imagination, produce that effect ; it was held that this liquid was not within the clause, although the woman proved that, after taking a wine-glassful, she felt dizzy in the head when she went to bed, and felt stupid in the head the next morning. (p)

But it need not be shewn what the noxious thing is ; it is sufficient if something is administered that produces miscarriage. (q)

To constitute an administering, or causing to be taken, it is not necessary that there should be a delivery by the hand. Where, therefore, on an indictment for administering poison and causing poison to be taken, it appeared that the prisoner had mixed poison with coffee, and had told her mistress that the coffee was for her, and the mistress took it, and drank some of it ; it was held that this was sufficient. (s) A mere delivery to the woman, however, is not sufficient ; the poison must be taken into the mouth, and, it seems, some of it swallowed, to constitute an administering. (t)

Upon an indictment for unlawfully administering to, and causing to be taken by, Emma Cheney, poison, with intent to procure her miscarriage, it appeared that she, being and believing herself to be pregnant, applied to the prisoner to get her something to procure her miscarriage, and that the prisoner accordingly purchased some preparation of mercury, which he gave to her, directing her to take one-half of the quantity in gin ; Cheney accordingly procured the gin, and, in the absence of the prisoner, took the dose, which produced a miscarriage. The jury found these facts, and that the mercury was both given by the prisoner to Cheney, and taken by her, with intent to procure the miscarriage ; and, upon a case reserved, it

(o) *R. v. Hillman*, L. & C. 343. *R. v. Tilley*, 14 Cox, C. C. 502.

(p) *R. v. Isaacs*, L. & C. 220 ; 33 L. J. M. C. 60.

(q) *R. v. Hollis and Blakeman*, 12 Cox, C. C. 464.

(s) *R. v. Harley*, 4 C. & P. 369, J. A. Park, J.

(t) *R. v. Cadman*, R. & M., C. C. R. 114.

was held that the prisoner was properly convicted; as there was a 'causing to be taken' within the meaning of the statute. (*u*) So where on a similar indictment it appeared that the prisoner had talked with L. Chuter about her being with child, and brought her a bunch of savin, and told her, if she put it in some gin, and took from half a glass to a glass two or three times a week, it would destroy her child, and she took the savin and gin three or four times accordingly; and the prisoner afterwards induced Chuter to get some blue pills from a chemist, which the prisoner made up with some flour and tea into pills, of which Chuter took twenty or thirty, and was very ill from the time of taking the pills till she was confined; it was held, upon a case reserved, that there was no distinction between this and the preceding case. (*v*)

It is to be observed that under the new statute, in such cases as the two last, the woman being with child would be a principal, and the man an accessory before the fact; but where the woman is not with child these cases will still apply; for there the woman's criminality will be exactly the same as it was under the former Act.

On an indictment for administering savin with intent to procure abortion, the administration of savin on one day was proved, and it was proposed on the part of the prosecution to prove the administration of similar drugs on many subsequent days for the purpose of shewing the intent, and also as part of the same felony, and it was urged that the substance of the felony was the administration of drugs for the purpose of procuring abortion, and if that were done by homœopathic doses, taken for a long period, all would form part of one felony; but Cresswell, J., held that other matters of the same description might be proved for the purpose of shewing the intent, but that the administration of other savin on other days could not be given in evidence as part of the offence. (*w*)

Upon the trial of any offence mentioned in this chapter the prisoner may be convicted of an attempt to commit the same.

(*u*) *R. v. Wilson*, D. & B. C. C. 127. Cheney, though culpable, was not guilty of felony, and therefore not guilty of the felony created by the statute, and the prisoner was, therefore, the only person coming within the words as the principal; and this distinguishes the case from *R. v. Williams*, 1 Den. C. C. 39.

(*v*) *R. v. Farrow*, D. & B. C. C. 164.

It is not stated expressly whether the savin and pills were taken in the absence of the prisoner, but the inference from the facts stated is that they were. See also *R. v. Gaylor*, D. & B. C. C. 288. *R. v. Fretwell*; 1 L. & C. 161, vol. i. p. 186.

(*w*) *R. v. Calder*, 1 Cox, C. C. 348. See *R. v. Perry*, *ante*, p. 220, note (*n*).

## CHAPTER THE FIFTH.

### OF RAPE, THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN, AND PROCURING THE DEFILEMENT OF GIRLS UNDER AGE.

#### SEC. I.

#### *Of Rape.*<sup>1</sup>

RAPE has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will. (*a*)

This offence formerly was, for many years, justly visited with capital punishment; but it does not appear to have been regarded as equally heinous at all periods of our Constitution. Anciently, indeed, it appears to have been treated as a felony, and, consequently, punishable with death; but this was afterwards thought too hard; and, in its stead, another severe but not capital punishment was inflicted by William the Conqueror, namely, castration and loss of eyes, which continued till after Bracton wrote, in the reign of Henry III. (*b*) The punishment for rape was still further mitigated, in the reign of Edward I., by the statute of Westm. 1, c. 13, which reduced the offence to a trespass, and subjected the party to two years' imprisonment, and a fine at the King's will. This lenity, however, is said to have been productive of terrible consequences; and it was, therefore, found necessary, in about ten years afterwards, and in the same reign, again to make the offence of forcible rape a felony, by the statute of Westm. 2, c. 34. The punishment was still further enhanced by the 18 Eliz. c. 7, s. 1. But the former statutes are repealed.

(*a*) 1 Hawk. P. C. c. 41, s. 2. 1 Hale, 627, 628. Co. Lit. 123 *b*. 2 Inst. 180. 3 Inst. 60. 4 Blac. Com. 210. 1 East, P. C. c. 10, s. 1, p. 434. See *R. v. Camplin*, *post*, 225, where it was remarked that in the statute of Westminster, 2, c. 34, the offence

of rape is described to be ravishing a woman where she did not consent.

(*b*) 4 Blac. Com. 211. 1 Hawk. P. C. c. 41, s. 11. 1 Hale, 627. Bract. lib. 3, c. 28. Leg. Gul. i. l. 19, Wilk. Leg. Anglo-Sax. 222, 290.

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#### AMERICAN NOTE.

<sup>1</sup> See *Pollard v. S.*, 2 Clark, 567. *S. v. Hargrave*, 65 N. C. 466. *S. v. Tarr*, 28 Iowa, 397. *Kelly v. C.*, 1 Grant, 484. The American Statutes in some States follow the words "against her will" and in others "without her consent," Bishop, ii. s. 1115. Where a drunken woman fell asleep on the

road-side, and a man, by force, had connection with her, it was held not to be rape in *P. v. Quin*, 50 Barb. 128, but to be rape in *C. v. Burke*, 105 Mass. 326; 7 Am. R. 531. Rape is felony by common law in the States. In Missouri it is misdemeanor, Bishop, ii. s. 1134.

And now by the 24 & 25 Vict. c. 100, s. 48, 'Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (c) to be kept in penal servitude for life, [or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.]' (d)

An indictment for this offence may be prosecuted at any time, and notwithstanding any subsequent assent of the party grieved. (e)

All who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women. (f) And there may be accessories before and after in this offence; and such accessories are punishable under the 24 & 25 Vict. c. 100, s. 67.

The law presumes that an infant, under the age of fourteen years, is unable to commit the crime of rape;<sup>1</sup> and, therefore, he cannot be guilty of it; (h) or of an assault with intent to commit a rape; (i) and if he be under that age, no evidence is admissible to shew that, in point of fact, he could commit the offence of rape. (j) This doctrine, however, proceeds upon the ground of impotency, rather than the want of discretion; and such infant may, therefore, be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear, by sufficient circumstances, that he had a mischievous discretion. (k) A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract; but he may be guilty as a principal, by assisting another person to commit a rape upon his wife; for though in marriage the wife has given up her body to her husband, she is not by him to be prostituted to another. (l) But where a prisoner was convicted upon an indictment charging him with inflicting grievous bodily harm upon his wife and with an assault occasioning actual bodily harm to her, it appeared that at a time when he knew, and when his wife did not know, that he had gonorrhœa, he had connection with her and infected her. The wife would not have submitted to the intercourse had she known of his condition. It was held that the conviction was bad because there had been no assault on the part of the prisoner. (ll)

(c) The words in brackets are repealed, but the punishment remains the same, see *ante*, p. 204, note (g).

(d) This clause is taken from the 9 Geo. 4, c. 31, s. 16; 10 Geo. 4, c. 34, s. 19 (1); and 4 & 5 Vict. c. 56, s. 3.

(e) 1 Hale, 631, 632. 1 East, P. C. c. 10, s. 9, p. 446.

(f) R. v. Vide, Fitz. Corone, pl. 86. 1 Hawk. P. C. c. 41, s. 10. Lord Baltimore's case, 4 Burr. 2179. 1 Hale, 628, 633. 1 East, P. C. c. 10, s. 1, p. 435. R. v. Burgess, Trin. T. 1813, *post*, p. 231.

(h) 1 Hale, 630. R. v. Brimlow, 2

Moo. C. C. R. 122. R. v. Groombridge, 7 C. & P. 582, Gaselee, J., and Lord Abinger, C. B. See R. v. Waite (1892), 2 Q. B. 600, *post*, p. 238.

(i) R. v. Eldershaw, 3 C. & P. 396, Vaughan, B. R. v. Phillips, 8 C. & P. 736, Patteson, J. See vol. i. p. 117.

(j) R. v. Phillips, 8 C. & P. 736, Patteson, J. R. v. Jordan, 9 C. & P. 118, Williams, J., *post*, p. 241.

(k) 1 Hale, 620.<sup>2</sup>

(l) Lord Castlehaven's case, 1 St. Tri. 387. 1 Hale, 629. Hutt. 116. 1 Str. 633.

(ll) R. v. Clarence, 22 Q. B. D. 23, *per*

#### AMERICAN NOTES.

<sup>1</sup> Some American Courts adhere to the English rule, while some only regard it as *prima facie* evidence of incompetency, which may be rebutted by evidence of capability in fact. Bishop, ii. s. 1117. See C. v. Green,

2 Pick. 380. Williams v. S., 14 Ohio, 222. P. v. Randolph, 2 Park. (N. Y.) 174.

<sup>2</sup> See S. v. Jones, 83 N. C. 605; 35 Am. R. 586.

Where a party took a woman by force, compelled her to marry him, and then had carnal knowledge of her by force, it appears to have been holden, that she could not maintain an appeal of rape against her husband, unless the marriage were first legally dissolved: but that when the marriage was made void, *ab initio*, by a declaratory sentence in the ecclesiastical court, the offence became punishable, as if there had been no marriage. (*m*) The forcible taking away, and marrying a woman against her will, was, however, made felony by the 3 Hen. 7, c. 2. And though that statute is repealed, there are certain provisions against the forcible or unlawful abduction of females, which will be mentioned in a subsequent chapter. (*n*)

The offence of rape may be committed, though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress. (*o*) If non-resistance on the part of a prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able, from want of strength, to resist any longer, or from the number of persons attacking her, she considered resistance dangerous, and absolutely useless, the crime is complete. (*p*) And it will not be any excuse that she was first taken with her own consent, if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher: for she is still under the protection of the law, and may not be forced. (*q*) Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favour of the party accused, especially in doubtful cases. (*r*) The notion that, if the woman conceived, it could not be a rape, because she must, in such case, have consented, appears to be quite exploded. (*s*)

If a man have connection with a woman in a state of insensibility, he knowing her to be in such state, he is guilty of a rape, as the offence of rape is ravishing a woman where she did not consent. (*t*) Thus a man is guilty of a rape if he has connection with a woman when she is asleep, he knowing her to be so. (*u*)<sup>3</sup>

Lord Coleridge, C. J., Pollock and Huddleston, BB., Stephen, Manisty, Mathew, A. L. Smith, Willes, and Grantham, JJ. (Field, Hawkins, Day, and Charles, JJ., dissenting.)<sup>1</sup>

(*m*) 1 Hale, 629.

(*n*) *Post*, chap. vii.

(*o*) 1 Hawk. P. C. c. 41, s. 6. 1 East, P. C. c. 10, s. 7, p. 444; see *post*, p. 226.

(*p*) R. v. Hallett, 9 C. & P. 748, per Coleridge, J.

(*q*) 1 Hawk. P. C. c. 41, s. 7. 1 East, P. C. c. 10, s. 7, pp. 444, 445. 4 Blac. Com. 213.<sup>2</sup>

(*r*) 1 East, P. C. c. 10, s. 7, p. 445.

(*s*) 1 Hale, 631. 1 Hawk. P. C. c. 41, s. 8. 1 East, P. C. c. 10, s. 7, p. 445.

(*t*) R. v. Camplin, 1 Den. C. C. R. 90; 1 C. & K. 746. In this case the prisoner caused the insensibility by giving the woman liquor for the purpose of exciting her. R. v. Fletcher, Bell, C. C. 63; R. v. Fletcher, 35 L. J. M. C. 72; L. R. 1 C. C. R. 39; R. v. Barratt, 43 L. J. M. C. 7.

(*u*) R. v. Mayers, 12 Cox, C. C. 311, per Lush, J. R. v. Young, 14 Cox, C. C. 114. As to rape on lunatic by officer of asylum, see 53 Vict. c. 5, s. 324, *post*.

#### AMERICAN NOTES.

<sup>1</sup> Mr. Bishop disagrees with this decision, and expresses his concurrence with the minority of judges. Bishop, ii. s. 72 (*b*) 2.

<sup>2</sup> Where the woman consents to the connection for a small sum of money which the man refuses to pay, and he then has forcible

connection with her, this has been held to be a rape. S. v. Long, 93 N. C. 542.

<sup>3</sup> This seems not to be rape in America. C. v. Bush, 105 Mass. 376. C. v. Field, 4 Leigh, 645. P. v. Quin, 50 Barb. 144. Lewis v. S., 30 Ala. 54; but see Bishop, ii. s. 1122.

Where upon an indictment for rape the prosecutrix, a girl of thirteen, stated that she usually slept with her father, and having gone to sleep by his side, on awaking she found him having connection with her; the prisoner had had connection with her before, but she had never complained to any one, nor would she of her own accord now, and a woman, who saw them together on the bed on the occasion in question, stated that the girl appeared to lie quiet for a moment while the prisoner was upon her, but on seeing the witness she immediately attempted to push him off. Coleridge, J., told the jury: 'The question is, was she a consenting party? and you cannot doubt, after the evidence you have heard, that, although not in a state to give consent when the connection began, she betrayed no disposition to resistance when she might have done so, and that, too, before the connection was at an end. She had been so treated before without complaining, nor would she, from her own statement, have complained now. I think, therefore, there is not such an absence of consent throughout as to justify a conviction of rape.' (v)

On a trial for a rape upon an idiot girl, Willes, J., directed the jury, that if they were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty; but that a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape. (w)

The prisoner was convicted of attempting to rape a girl of fourteen years of age who had been blind from six weeks old and wrong in her mind, hardly capable of understanding anything that was said to her, but capable of going up and down stairs by herself. If placed in a chair by any one she would remain there till night, passing her evacuations in the chair. If told to lie down, she would do so. She could not communicate to her friends what she wanted. She could feed herself a little, but was obliged to be dressed and undressed, and was unable to do any work. The prisoner had known her and her family for two years, and knew she was not right in her mind. There were no marks of violence, but there had been recent connection, and the surgeon thought she had been in the habit of having connection. The girl upon being brought into court was evidently idiotic, and it was found impossible to communicate with her. She grinned, and made no reply to questions except a vacant laugh. The prisoner was seen by the girl's father lying on the girl, who was lying on a couch where she had been placed by her sister. When the father entered the room the prisoner was standing up buttoning his trousers, while the girl was lying quietly on the couch. Blackburn, J., said there was ample evidence of the want of capacity to give consent, and it was held that the act being done without consent the prisoner was rightly convicted. (x)

Where on the trial of a father for a rape on his daughter, aged fourteen years, it appeared that her father laid hold of her and had

(v) *R. v. Page*, 2 Cox, C. C. 133. (x) *R. v. Barratt*, 43 L. J. M. C. 7; see  
(w) Anon., stated by Willes, J., Bell, *R. v. Fletcher*, 35 L. J. M. C. 72, 1 C. C. R.  
C. C. 70; *R. v. Ryan*, 2 Cox, C. C. 115; 39. But see now 48 & 49 Vict. c. 69, s. 5,  
*R. v. Pressy*, 10 Cox, C. C. 635. (2), *post*, p. 239, as to such cases.



connection with her; he had previously told her not to tell any one what he had done to her; he had said he would throttle her and kill her, if she told anything he had done; he had throttled her, and had had connection with her many times before; and on these occasions he had told her not to tell, and that was the reason she did not tell; she consented to the prisoner's having connection with her because she was afraid of him; she was afraid of his choking her. Channel, B., told the jury, that 'if it is made out to your satisfaction that a kind of reign of terror was set up in this family, and in consequence of that terror and dread the girl allowed the connection to take place without resistance, then I am of opinion you may convict. It is possible she may have been a consenting party, and not influenced by dread: that is a question for you. She says the same thing had been done upon previous occasions, and her father had told her he would throttle her if she told her mother, and that is why she did not tell. She says she begged him not to do it, and to be quiet and leave her alone. This, in ordinary cases, would be quite insufficient; but in this case, if you think she remained passive under the influence of that dread and reign of terror which I have mentioned, and that is clearly made out, you may find the prisoner guilty.' (y)

By the Criminal Law Amendment Act, 1885 (48 and 49 Vict. c. 69), s. 4, 'Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape.'<sup>1</sup>

Upon an indictment containing a count for an assault with intent to commit a rape, and a count for a common assault, it appeared that the defendant, a surgeon, attended the prosecutrix for bleeding piles, and had been with her to consult another surgeon, and afterwards went with her into her bed-room, and told her he was ordered to give her an injection, and directed her to put her head on the bed and her feet on the floor, which she did, and her clothes were up over her back. He then began to use the injection, and the water ran down her legs. She was going to raise herself up, and he said, 'Put your head on the bed, and do not stir for a moment.' She had had injections before, and they keep persons still for a little while after they are applied. As she lay she perceived something very warm against her person; she resisted, and rose up from the bed, and said, 'Doctor, what do you mean?' His small clothes were quite open. She felt the parts of the prisoner enter hers just a little. Coleridge, J.: 'An assault with intent to commit a rape is very different from an assault with intent to have improper connection. The former is with intent to have connection by force; but here, according to the

(y) *R. v. Jones*, 4 Law T. 154. See *R. v. Day*, *post*, p. 241, and *R. v. Woodhouse*, 12 Cox, C. C. 443.

#### AMERICAN NOTE.

<sup>1</sup> See Bishop, i. s. 261, where it is suggested that in principle the act should be regarded as rape. See also ii., s. 1122, and *McNair v. S.*, 53 Ala. 453; *S. v. Burgdorf*, 53 Mo. 65; *Clark v. S.*, 30 Tex. 448.

statement of the prosecutrix, the prisoner desists the moment she resists, and at most it could only be an attempt by surprise to get possession of the person of the prosecutrix, and that is not an assault with intent to commit a rape, but is an assault. If in this case the prisoner had intended to have effected his purpose by force, the complete offence of rape would have been proved, as the prosecutrix states that the prisoner penetrated her person, and the smallest penetration is sufficient to complete the offence of rape. (b)

Upon an indictment for assault it appeared that the prisoner was a medical man, and that the girl alleged to have been assaulted was fourteen years old, and had been placed under his professional care in consequence of illness arising from suppressed menstruation. The defendant gave her medicines, and on her going to his house, and informing him that she was no better, he observed, 'Then I must try further means with you.' He then laid her down in the surgery, lifted up her clothes, and had connection with her, she making no resistance, believing, as she stated, that she was submitting to medical treatment for the ailment under which she laboured. The jury were directed that the girl was of an age to consent to a man having connection with her, and that if they thought she consented to such connection with the defendant, he ought to be acquitted; but if they were satisfied she was ignorant of the nature of the defendant's act, and made no resistance solely from a *bona-fide* belief that the defendant was (as he represented) treating her medically with a view to her cure, his conduct amounted in point of law to an assault. The jury convicted, and, upon a case reserved upon the question whether this direction to the jury was correct in point of law, after argument, Wilde, C. J., thus delivered judgment: 'This case is free from doubt. The finding of the jury is clear. They are told that if they think she consented to the connection, they must acquit; that the girl was competent to consent; and that it is a question for them whether she did so or no. This is said to be qualified by what follows, viz., that if they thought she made no resistance, solely from the belief that the prisoner was treating her medically, they should convict of an assault. I do not see that this is any qualification; it is a strictly correct direction. The girl is fourteen years old. She might at that age be ignorant of the nature of the act, morally as well as physically, and of its possible consequences. It is said that, as she made no resistance, she must be viewed as a consenting party. That is a fallacy. Children who go to a dentist make no resistance; but they are not consenting parties. The prisoner disarmed her by fraud. She acquiesced under a misrepresentation that what he was doing was with a view to a cure, and that only; whereas it was done solely to gratify the passion of the prisoner. How does this differ from a case of total deception? She consented to one thing; he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will. The cases (c) which have been referred to shew that where consent is caused by fraud, the act is at least an assault, and perhaps amounts to rape.

(b) *R. v. Stanton*, 1 C. & K. 415; see query: *R. v. Wright*, 4 F. & F. 967.

(c) *R. v. Saunders*, 8 C. & P. 265. *R. v. Williams*, ib. 286.

It has been suggested that were the act to be regarded in the light of medical treatment, it would be no offence, and that it was not left to the jury whether the prisoner did not intend it as such. That certainly was not left to them, nor need have been. The notion that a medical man might lawfully adopt such a mode of treatment is not to be tolerated in a court of justice. He would have committed a high ecclesiastical offence, at all events.' (d) In a very similar case the prisoner was held to be rightly convicted of rape. (dd)

There must be *penetratio*, or *res in re* in order to constitute the 'carnal knowledge,' which is a necessary part of this offence. (e) But a very slight penetration is sufficient. Thus, where it was proved on behalf of a prisoner, who was charged with having ravished a young girl, that the passage of her parts was so narrow that a finger could not be introduced; and that the membrane called the hymen, which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; but it was admitted that the hymen is in some cases an inch, and in others an inch and a half, beyond the orifice of the vagina. (f) Ashhurst, J., left it to the jury to say whether any penetration were proved. And the judges afterwards held, upon a conference (De Grey, C. J., and Eyre, B., being absent), that this direction was perfectly right; and that the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity. (g)

It is now settled that any penetration is sufficient, although the hymen be not ruptured. (h)

By the 24 & 25 Vict. c. 100, s. 63, 'Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.' (i)

(d) *R. v. Case*, 1 Den. C. C. R. 580; 19 L. J. M. C. 174. See *R. v. Rosinski*, R. & M. C. C. 19, *post*, *Assault*.

(dd) *R. v. Flattery*, 2 Q. B. D. 410.

(e) 1 Hale, 628. 3 Inst. 59, 60. 1 Hawk. P. C. c. 41, s. 3. Sum. 117. 1 East, P. C. c. 10, s. 3, p. 437. *R. v. Page*, Dy. 304, *a. in marg.* Cro. Car. 332.

(f) Upon this statement the reporters, in a note to *R. v. Hughes*, 9 C. & P. 752, observe, 'The first proposition appears to be much too strongly put, as several cases are mentioned by Dr. Davis (Elem. of Midw. 102), and Dr. Paris (1 Par. & Fonb. Med. Jur. 203), in which the hymen was entire during the pregnancy of the party, and in one case was obliged to be divided by a surgical operation at the time of the accouchement. With respect to the second proposition there may be some doubt, as in all the preparations in the museum of the Royal College of Surgeons, in which the hymen is shewn, it is not more than a quarter of an inch from the orifice of the vagina.'

(g) *R. v. Russen*, O. B. Oct. 1777. Serjt. Forster's MS. 1 East, P. C. c. 10, s. 3, pp. 438, 439. MS. Bayley, J.

(h) *R. v. Gammon*, 5 C. & P. 321. The prisoner was executed. *R. v. M'Rue*, 8 C. & P. 641, *et per* Bosanquet, J. But where that which is so very near to the entrance has not been ruptured it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape. *R. v. Jordan*, 9 C. & P. 118; *R. v. Allen*, 9 C. & P. 31; *R. v. Hughes*, 9 C. & P. 752; 2 M. C. C. R. 190; *R. v. Lines*, 1 C. & K. 393.

(i) This clause is taken from the 9 Geo. 4, c. 31, s. 18; and 10 Geo. 4, c. 34, s. 21 (1). Before these enactments there were great authorities to shew that there need not have been *emissio seminis* in order to constitute a rape. 1 Hale, 628; 1 East, P. C. c. 10, s. 3, p. 438; *R. v. Blomfield*, 1 East, P. C. *ibid.*; *R. v. Sheridan*, *ibid.*; *Post*, 274. See also *R. v. Reekespear*, R. & M. 342; *R. v. Cozens*, 6 C. & P. 351; *Brooks' case*, 2 Lew. 267; *R. v. Allen*, 9 C. & P. 31; *R. v. Jennings*, 4 C. & P. 249; *R. v. Cox*, 5 C. & P. 297. But this was doubtful, and there were many authorities to the contrary, 12 Rep. 37; Sum. 117; *Stamf.* 44; 1 Hawk. P. C. c. 4, s. 2; c. 41, s. 3; 1 East, P. C.

It seems that now a person may be convicted of rape, even if the fact of emission is negatived by the evidence. (*j*)

As the absence of previous consent is a material ingredient in the offence of rape, it must be averred in the indictment. (*k*) It is essential to aver, that the offender did feloniously 'ravish' the party; and the omission of the word *ravished* will not be supplied by an averment that the offender 'did carnally know,' &c. (*l*) It has been considered, that the words 'did carnally know' are not essential, on the ground that *rapere* signifies legally as much as *carnaliter cognoscere*; (*m*) but they are at any rate appropriate in describing the nature of the crime, and appear to be generally used. (*n*) The omission of them would not, therefore, be prudent. (*o*) In an indictment for a rape the words *carnaliter cognovit* were omitted; on a case reserved, six judges out of twelve thought it cured by the verdict, because those words are not in the 9 Geo. 4, c. 31; but they thought it bad before verdict. (*p*) Where an indictment alleged that the prisoner in and upon E. F., 'violently and feloniously did make (omitting 'an assault'), and her the said E. F., then and there and against her will, violently and feloniously did ravish and carnally know;' upon a case reserved, ten of the judges were of opinion that the judgment ought not to be arrested, because of the omission of the words 'an assault.' (*q*) The indictment usually concludes, 'against the form of the statute;' but it seems that such a conclusion was always unnecessary. (*r*) The indictment must, before the 14 & 15 Vict. c. 100, s. 24, have concluded, as in other cases, 'against the peace,' &c. (*s*)

The indictment against aiders and abettors may lay the fact to have been done by all, or may charge it as having been done by one and abetted by the rest. Thus where, upon an appeal against

c. 10, s. 3, pp. 437, 438, 439, 440; R. v. Fleming, 2 Leach, 854; R. v. Burrows, R. & R. 519; Burrows' case, 1 Lew. 288; see 9 Geo. 4, c. 31, s. 18.<sup>1</sup>

(*j*) R. v. Marsden (1891), 2 Q. B. 149.

(*k*) Cro. Circ. Comp. 427. 2 Stark. Crim. Plead. 409. 3 Chit. Crim. Law, 815.

(*l*) 1 Hale, 628, 632. Br. Indict. pl. 7, citing 9 Ed. 4, c. 6.

(*m*) 2 Inst. 180, and see 2 Hawk. P. C. c. 25, s. 56. Staundf. 81. Co. Lit. 137.

(*n*) See the precedents referred to, *ante*, note (*k*).

(*o*) 1 East, P. C. c. 10, s. 10, p. 448. 2 Stark. Crim. Plead. 409, note (*p*). 3 Chit. Crim. Law, 812. It is laid down, generally, in some of the books, that the indictment must be *rapuit et carnaliter cognovit*, 1 Hale, 628, 632.

(*p*) R. v. Warren, M. T. 1832. MSS. Bayley, B. 3 Burn, J., D. & W. 725. See 7 Geo. 4, c. 64, s. 21, which makes the indictment sufficient after verdict, 'if it describe the offence in the words of the statute,' 'where the offence charged has been created by any statute or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute.'

(*q*) R. v. Allen, 9 C. & P. 521. 2 M. C. C. R. 179.

(*r*) 1 East, P. C. c. 10, s. 10, p. 448; but see 2 Stark. Crim. Plead. 409, note.

(*s*) R. v. Scott, MS. Bayley, J., R. & R. 415.

#### AMERICAN NOTE.

<sup>1</sup> Emission is generally deemed unessential in America, but not in Ohio, see Williams v. S., 14 Ohio, 222; 45 Am. D. 536. Blackburn v. S., 22 Ohio St. 102. Noble v. S., 22 Ohio St. 541. In North Carolina, a

statute has been passed rendering it unessential. See S. v. Hargreaves, 65 N. C. 466, and see S. v. Le Blanc, 1 Tread. 354. P. v. Sullivan, Add. (Pa.) 143. Waller v. S., 40 Ala. 325. C. v. Thomas, 1 Va. Cas. 307.

several persons for ravishing the appellant's wife, an objection was taken that only one should have been charged as ravishing, and the others as accessories; or that there should have been several appeals, as the ravishing by one would not be the ravishing of the others: it was answered that if two come to ravish, and one by comfort of the other does the act, both are principals, and the case proceeded. (t) And where the indictment was against three persons for a rape, charging them all as principals in the first degree, that they ravished and carnally knew the woman; and the prisoners were all found guilty; the judge who tried them doubted whether the charge could be supported; and, at his desire, the case was mentioned by Heath, J., to the other judges, and all who were present agreed that the charge was valid, though the form was not to be recommended; but they gave no regular opinion, because the case was not regularly before them. (u)

H. was indicted for rape and W. for aiding and abetting. H. was found guilty of the attempt only, under 14 & 15 Vict. c. 100, s. 9, and W. of aiding in the attempt. It was held that W. was rightly convicted. (v)

An indictment in the first count charged Folkes with committing a rape, and Ludds with being present, aiding and assisting; the second count charged Ludds as principal in the first degree, and Folkes as aiding and assisting; the third count charged an evil-disposed person, to the jurors unknown, as principal in the first degree, and Folkes and Ludds as aiding and assisting; and the fourth count charged a certain other evil-disposed person as principal, and Folkes and Ludds as aiders. Previous to pleading, the Court was urged to quash the indictment on the ground that it was bad for misjoinder of two offences of a different nature, and not liable to the same punishment, and that for aiding and abetting no provision was made by the 9 Geo. 4, c. 81. It was also alleged that the indictment contained different transactions and that the prosecutrix was bound to make an election. The Court overruled both objections. Ludds was acquitted, and a general verdict of guilty was found against Folkes. It appeared that the prisoner, together with three other men, committed at the same time and place, the one after the other, successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn; and the evidence, if believed, was sufficient to sustain the first count, as far as it charged Folkes as principal, as the other counts which charged him as aiding and assisting; and, upon a case reserved, the judges held that the conviction was good on the first count. (w) Where the first count

(t) *R. v. Vide*, Fitz. Corone, pl. 86.

(u) *R. v. Burgess*, Tr. T. 1813, Lord Ellenborough, C. J., Mansfield, C. J., and Grose, J., were absent. The case is mentioned as having occurred at the Chester Spr. Ass. 1813, in 5 Evans' Col. Stat. Cl. 6, p. 399, note (12).

(v) *R. v. Hapgood and Wyatt*, L. R. 1 C. C. R. 221, S. C.; *R. v. Wyatt*, 39 L. J. M. C. 83.

(w) *R. v. Folkes, R. & M.* 354. There is an inaccuracy in the statement of this

case; it treats the charge against the principal in the first degree as one count, and the charge against the principal in the second degree as another count; but that is not so, as both charges only constitute one count, as is plain from the indictments in murder, in which the conclusion, 'and so the jurors, &c., say, that A., B., and C. murdered,' always follows the allegation that B. and C. were present, aiding and assisting. C. S. G.

charged Gray as principal in the first degree, and Wise as present, aiding and assisting : and the second count charged Wise as principal in the first degree, and Gray as present, aiding and assisting ; it was moved to quash the indictment, on the ground of misjoinder, as the judgment might be different, and it was said that this objection did not ultimately become material in the preceding case, as one prisoner alone was convicted ; but per Coleridge, J., 'The 9 Geo. 4, c. 31, s. 16, awards the punishment of death to "every person convicted of the crime of rape." Now, I take it that a principal in the second degree falls clearly within that provision : and that, therefore, the objection that the judgment might be different entirely fails.' (x) A woman who has aided a man in the commission of a rape may be indicted as a principal. (xx)

The party ravished is a competent witness : and indeed, she is so much considered as a witness of necessity, that where a husband was charged with having assisted another man in ravishing his own wife, the wife was admitted as a witness against her husband. (y)

But though the party ravished is a competent witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony.<sup>1</sup> Thus, if she be of good fame ; if she presently discovered the offence, and made search for the offender ; if she shewed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners ; if the place where the fact was done were remote from inhabitants or passengers ; if the party accused fled for it ; these, and the like, are concurring circumstances, which give greater probability to her evidence. (z) But if, on the other hand, the witness be of evil fame, and stand unsupported by others ; if, without being under control, or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining ; if the place where the fact is alleged to have been committed, was near to persons by whom she might probably have been heard, and yet she made no outcry ; if she has given wrong descriptions of the place ; these and the like circumstances, afford a strong, though not conclusive, presumption that her testimony is feigned. (a)

It is the usual course, in cases of rape, to ask the prosecutrix whether she made any complaint, and, if so, to whom ; and if she mentions a person to whom she made complaint, to call such person

(x) *R. v. Gray*, 7 C. & P. 164 ; *R. v. Crisham*, C. & M. 187, S. P. See also *R. v. Parry*, 7 C. & P. 836, where an indictment against five charged each as principal in one count, and the others as aiders and abettors.

(xx) *R. v. Ram*, 17 Cox, C. C. 609.

(y) *R. v. Lord Castlehaven*, 1 St. Tri. 387. 1 Hale, 629. Hutt. 116. 1 Str. 633.

(z) 4 Blac. Com. 213. 1 East, P. C. c. 10, s. 7, p. 445.

(a) 4 Blac. Com. 213, 214. 1 East, P. C. c. 10, s. 7, pp. 445, 446.

#### AMERICAN NOTE.

<sup>1</sup> See *P. v. Hulse*, 3 Hill, 309. *S. v. De Wolfe*, 8 Conn. 93. *Reynolds v. P.*, 41 How. Pr. 179. *Barney v. P.*, 22 Ill. 160. *S. v. Cross*, 12 Iowa, 66. *Lacy v. S.*, 45 Ala. 80.

The complaint made by the prosecutrix is admissible in evidence. *Phillips v. S.*, 9 Humph. 246, but see *Baccio v. P.*, 41 N. Y. 265.

to prove that fact; but it has been the invariable practice not to permit either the prosecutrix, or the person so called, to state the particulars of the complaint, during the examination in chief. (b) Upon this practice, in a case where a witness was proceeding to state the particulars of the complaint, when the prisoner's counsel interposed, Parke, B., observed, 'The sense of the thing certainly is, that the jury should, in the first instance, know the nature of the complaint, made by the prosecutrix, and all that she then said. But for reasons, which I could never understand, the usage has obtained that the prosecutrix's counsel should only inquire generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint, by cross-examination.' And the witness was accordingly, only permitted to prove generally that the prosecutrix complained to her of the ill-treatment she had experienced from the prisoner. (c)

But where on a trial for rape the prosecutrix said, that very soon after the alleged offence, as she was returning home she had complained to Mrs. P., and Mrs. P., being called, was asked whether the prosecutrix made any complaint, and was directed to answer 'yes,' or 'no;' and on her answering 'yes,' she was asked whether the prosecutrix named any particular person, and the witness, being directed to answer 'yes' or 'no,' answered 'yes;' it was then asked whose name was mentioned, but it was objected that this question could not be put: the rule was that the fact of a complaint having been made was admissible, but not the particulars of it. Cresswell, J.: 'What the prosecutrix said at the time of committing the offence, would be receivable in evidence on the grounds that the prisoner was present and the violence going on; but if the violence was over and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence. I think that the case of *R. v. Wink* (d) is a direct authority in point; but I own that my mind is not convinced as to the latter part of that case, as it seems to me to be rather too refined a distinction to prevent the name from being mentioned, and yet to permit it to be asked, whether, in consequence of what was said, the witness apprehended a particular person. I think you ought not to go so far as that; and that the question, "whose name was mentioned?" ought not to be asked.' (e)

(b) *R. v. Clarke*, 2 Stark. N. P. C. 241. 3 Stark. Evid. 951.

(c) *R. v. Walker*, 2 M. & Rob. 212. It should seem that the grounds, upon which the making the complaint may be proved, but not the particulars of it, are, that the making the complaint is a fact, but the particulars of it are mere statements neither made on oath nor in the presence of the prisoner. In *R. v. Wink*, 6 C. & P. 397, Patteson, J., held that a party, who had been robbed, might be asked if he named any person as the person who had robbed him to a constable, but that he ought not to be asked what name he mentioned. This seems at variance with *R. v. Walker*, because there it appears that the witness was allowed

to prove a complaint of the conduct of the prisoner: now, that is proving one particular, and perhaps the most important particular of the whole. The practice, certainly, has been merely to ask whether a complaint was made, and only to permit the witness to answer 'yes,' or 'no.' The ground upon which the prisoner's counsel is entitled to ask what the particulars of the complaint were, is, that he has a right to inquire into any statement made by the prosecutrix, relative to the transaction, if he think fit, in order to ascertain whether she has, at all times, told the same story. C. S. G.

(d) *Supra*, note (c).

(e) *R. v. Osborne*, C. & M. 622. See *R. v. Eyre*, 2 F. & F. 579.

Where the party ravished has died before the trial, it is not competent to prove the particulars of a complaint made by her soon after the offence was committed, with a view of shewing who the parties were who committed it. (*f*)

So where the prosecutrix is not examined as a witness, it is not competent to prove that she made a complaint soon after the occurrence; for such evidence is merely confirmatory of the story of the prosecutrix, and no part of the *res gestæ*. (*ff*) Where on an indictment for abusing a child under ten years of age, the child was wholly ignorant of the nature of an oath, and therefore not examined, and it was proposed to give evidence of a statement made by her relative to the offence, and the name of the person who committed it; Pollock, C. B., refused to admit it, observing, 'If a man says to his surgeon, "I have a pain in my head," or a pain in such a part of the body, that is evidence; but if he says to his surgeon, "I have a wound," and adds, "I met John Thomas, who had a sword, and ran me through the body with it," that would be no evidence against John Thomas: and it is certainly a very odd reason for receiving the evidence of what a child has said, that that child is not capable of taking an oath.' (*g*)

The character of the prosecutrix, as to general chastity, may be impeached by *general* evidence, (*h*) as by shewing her general light character, and giving general evidence of her being a street walker. (*i*) And the prosecutrix may be cross-examined as to particular discreditable transactions (*k*) and as to her having had connection with the prisoner previously to the alleged rape, (*l*) and if she deny such connection, the prisoner may shew that she has been previously connected with him. (*m*) On an indictment for an indecent assault, as in cases of rape, or attempt to commit rape, the answer of the prosecutrix, to questions put to her on cross-examination as to particular acts of connection with persons named to her, other than the prisoner, is final, and the party questioning is bound thereby, and if her answer be a denial, the persons named cannot be called to contradict her. (*n*)

Where, on a trial for rape, the prosecutrix was cross-examined as to a charge of stealing money from a former mistress, and as to the account she had given of the money found in her possession to a constable, and she said that she told the constable a gentleman had given it her for not telling of his insulting her, and denied that she had told him that it was given her by the gentleman for having connection with her; it was held that the constable could not be called

(*f*) *R. v. Megson*, 9 C. & P. 420. See 1 Ph. Ev. 204, 8 Ed.

(*ff*) 1 East, P. C. 443; *R. v. Guttridge*, 9 C. & P. 471.

(*g*) *R. v. Nicholas*, 2 C. & K. 246. See *Brazier's case*, 1 East, P. C. 443.

(*h*) *R. v. Clarke*, 2 Stark. N. P. C. 241. 3 Stark. Evid. 951.

(*i*) *R. v. Clay*, 5 Cox, C. C. 146, where Patteson, J., admitted evidence that the prosecutrix had been seen on the streets of Shrewsbury as a reputed prostitute. *R. v. Tislington*, 1 Cox, C. C. 48, where Abinger, C. B., allowed witnesses to be called to prove

general want of decency in the prosecutrix, and then permitted the prosecutrix to call witnesses to rebut their evidence.

(*k*) *R. v. Barker*, 3 C. & P. 589.

(*l*) *R. v. Martin*, 6 C. & P. 562.

(*m*) *R. v. Aspinall*, 3 Stark. Ev. 952. *R. v. Riley*, 18 Q. B. D. 481.

(*n*) *R. v. Holmes*, 41 L. J. M. C. 12; L. R. 1 C. C. R. 334; *R. v. Cockcroft*, 11 Cox, C. C. 410. *Scmble*, that the question may be put to her in cross-examination, but that she is not bound to answer it. See *R. v. Robins*, 2 M. & Rob. 512.



to contradict her, and to prove that she told him the gentleman had given her the money for having connection with her. (o)

The application of these and other rules upon this difficult subject should always be made with due regard to the cautious observations of a great and experienced judge. Lord Hale says, 'It is true, that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.' (p) He then mentions two remarkable cases of malicious prosecution for this crime, that had come within his own knowledge: and concludes, 'I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the Court and jury may, with so much ease, be imposed upon without great care and vigilance: the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of malicious and false witnesses.' (q)

Where, on a trial for rape, the prosecutrix stated that she complained almost immediately to her mistress, and the next day her clothes were washed by a washerwoman, and they had blood on them; Pollock, C. B., directed these persons to be called as witnesses for the prosecution, although they were attending as witnesses for the prisoner, but allowed the counsel for the prosecution all latitude in examining them. (r)

On a trial for rape it was proposed on the part of the prisoner to ask a witness for the defence as to something that had been said by a relative of the prosecutrix to a relative of the prisoner, in the presence of the prosecutrix, about making it up; it was objected that evidence of a conversation between third persons, not made in the presence of the prisoner, was inadmissible. Martin, B.: 'In a civil case, what is said in the presence of either of the parties is admissible, because it is open to the party so present to express assent or dissent to what is said, and that would be admissible against him. In criminal cases, the prosecutor, although not in strict law a party to the case, is so in fact; and I think that the rule applicable to conversation in the presence of a party in a civil case may be fairly extended to a conversation in the presence of the prosecutor in a criminal case.' (s)

It has already been shewn that this offence is now punishable by penal servitude for life. (t) By the 24 & 25 Vict. c. 100, s. 67, 'every principal in the second degree, and every accessory before the fact, is punishable in the same manner as a principal in the first degree; and every accessory after the fact to any felony punishable under this Act (except murder), is liable to be imprisoned for any term not exceeding two years, with or without hard labour.'

Upon an indictment for a rape, a prisoner may be convicted under

(o) *R. v. Dean*, 6 Cox, C. C. 23. Platt, B.,  
after consulting Wightman, J.

(p) 1 Hale, 635.

(q) 1 Hale, 636.

(r) *R. v. Stroner*, 1 C. & K. 650.

(s) *R. v. Arnall*, 8 Cox, C. C. 439, *sed quære*.

(t) *Ante*, p. 224.

the 14 & 15 Vict. c. 100, s. 9, of an attempt to commit the same, and thereupon will be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the rape. (x)

It may be as well to observe, that by the 4 & 5 Vict. c. 56, s. 6, the crime of rape shall not 'be tried, or triable, before any justices of the peace, at any general or quarter sessions of the peace.'

Where there is no reason to expect that the facts and circumstances of the case, when given in evidence, will establish that the crime of rape has been completed, the proper course will be, to prefer an indictment at common law, for an assault with intent to ravish; which offence, though only a misdemeanor, yet is one of a very aggravated nature, and has, in many instances, been visited with exemplary punishment. (y) Formerly where, upon an indictment for an assault with intent to commit a rape, the prosecutrix proved a rape actually committed, an acquittal would have been directed, on the ground that the misdemeanor was merged in the felony. (z) But now by the 14 & 15 Vict. c. 100, s. 12, 'If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the Court, before which such trial may be had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case, such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.'

Upon an indictment for an assault, with intent to commit a rape, Patteson, J., in summing up, said, 'In order to find the prisoner guilty of an assault, with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part.' (a)

It was held by the same learned judge, in the same case, that evidence that the prisoner, on a prior occasion, had taken liberties with the prosecutrix, was not admissible, to shew the prisoner's intent. (b)

Under a count for an assault, with intent to commit a rape, a prisoner may be convicted of a common assault. (c) But on an indictment, containing a count for an assault with intent to com-

(x) As to accessories to an attempt, see *R. v. Hapgood*, *ante*, p. 231.

(y) To the extent of fine, imprisonment, and pillory, and finding sureties for good behaviour for life, 1 East, P. C. c. 10, s. 4, p. 441. The punishment of the pillory could not now be imposed for such offence, in consequence of the 56 Geo. 3, c. 138; and with respect to sureties for good behaviour for life, it is observed that such part of the sentence is not consonant to the practice of our present

constitution in the apportionment of discretionary punishment; as tending to imprisonment for life. East, P. C. *ibid*.

(z) *R. v. Harmwood*, *cor. Buller, J.*, Winchester Spr. Ass. 1787, 1 East, P. C. c. 8, s. 5, p. 411, and c. 16, s. 3, p. 440. *R. v. Nicholls*, 2 Cox, C. C. 182, S. P.

(a) *R. v. Lloyd*, 7 C. & P. 318, Patteson, J.

(b) *Ibid*.

(c) Per Hullock, B., 1 Lewin, 16.

mit a rape, and a count for a common assault, if the prisoner be acquitted on the count for an assault with intent to commit a rape, on the ground that the prosecutrix consented, he cannot be convicted on the count for a common assault; for to support that count such an assault must be proved as could not be justified if an action were brought for it, and leave and licence pleaded. (d)

An indictment may contain two counts for two different attempts to commit a rape on the same female, and evidence of both may be given on the trial. (e) And where one count charged the prisoner with an attempt to commit a rape, and another count charged him with an assault, and the record stated that the jury found him 'guilty of the misdemeanor and offence in the said indictment specified,' and it was adjudged that 'for the said misdemeanor,' he shall be imprisoned for two years and kept to hard labour; it was held, upon error, that the word 'misdemeanor' was *nomen collectivum*, and therefore the finding of the jury was in effect that the prisoner was guilty of the whole matter charged by the indictment, and consequently the judgment was warranted by the verdict. (f)

By the 24 & 25 Vict. c. 100, s. 38, in case of assault with intent to commit a rape, and by sec. 52 (g) in case of any indecent assault on any female, the Court may sentence the offender to be imprisoned, for any term not exceeding two years, with or without hard labour, and may also (if it shall so think fit), by sec. 71, fine the offender, and require him to find sureties for keeping the peace.<sup>1</sup>

Assaults by taking indecent liberties with females, though without actual force or violence, will be mentioned in a subsequent chapter. (i)

## SEC. II.

### *Of the Unlawful Carnal Knowledge of Female Children.<sup>2</sup>*

In rape, as we have seen, the carnal knowledge must be without the consent of the party; but, by the 18 Eliz. c. 7, carnal knowledge of any woman-child under the age of ten years, was made felony without benefit of clergy; and this without any reference to the consent or non-consent of the child, which was therefore considered as immaterial.

It appears at one time to have been thought, that the carnal

(d) *R. v. Meredith*, 8 C. & P. 589, Lord Abinger, C. B. ton, J., thought the two counts only charged one assault.

(e) *R. v. Davies*, 5 Cox, C. C. 328.

(g) *Post*, p. 240.

(f) *R. v. Powell*, 2 B. & Ad. 75. Taun-

(i) *Post*, p. 241, and chap. x. s. 1.

#### AMERICAN NOTES.

<sup>1</sup> In New York, a person who decoyed a girl under ten years of age, and stood before her indecently exposed, was held guilty of an assault with intent to rape. *Hays v. P.*, 1 Hill, N. Y. 351. See *P. v. McDonald*, 9 Mich. 150.

<sup>2</sup> By the common law of America (i. e. by English common law and English statutes

before the Independence, 3 Ed. 1, c. 18 and 18 Eliz. c. 7, s. 4), the unlawful carnal knowledge of a girl between ten and twelve years of age is a misdemeanor, and below ten probably a felony, and in either case consent is no defence. In most, or possibly all, of the States the subject is regulated by statute. See Bishop, ii. s. 1133.

knowledge of a child above the age of ten and under twelve years was rape, though she consented: twelve years being the age of consent in a female, and the statute Westm. 1, c. 13, which enacted, 'That none do ravish any maiden *within age*, neither by her own consent nor without,' being admitted to refer, by the words 'within age,' to the age of twelve years. (*k*) It was, however, afterwards well established, that if the child was above ten years old it was not a rape, unless it was without her consent. (*l*) But children above that age, and under twelve, were within the protection of the statute of Westm. 1, c. 13, the law with respect to the carnal knowledge of such children not having been altered by either of the subsequent statutes of Westm. 2, c. 34, or 18 Eliz. c. 7. The statute Westm. 1, c. 13, made the deflowering a child above ten years old, and under twelve, though with her own consent, a misdemeanor punishable by two years' imprisonment, and fine at the King's pleasure. (*m*)

These statutes, and the 9 Geo. 4, c. 31, are now repealed; as are also secs. 50 and 51 of the 24 & 25 Vict. c. 100: (*n*) and now by the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, 'Any person who unlawfully and carnally knows (*o*) any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour. (*p*)

'Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

(*k*) 1 Hale, 631. 2 Inst. 180. 3 Inst. 60.  
(*l*) Sum. 112. 4 Blac. Com. 212. 1 East,  
P. C. c. 10, s. 2, p. 436.

(*m*) 4 Blac. Com. 212. 1 East, P. C.  
c. 10, s. 2, p. 436.

(*n*) Sections 50 and 51 are repealed, 'except as to anything heretofore duly done thereunder, and except so far as may be necessary for the purpose of supporting and continuing any proceeding taken, or of prosecuting or punishing any person for any

offence committed before the passing of the Act.'

(*o*) Proof of penetration is sufficient, and it is not necessary to prove emission. *R. v. Marsden* (1891), 2 Q. B. 149.

(*p*) A boy under fourteen years of age cannot be convicted of this offence. *R. v. Waite* (1892), 2 Q. B. 600.<sup>1</sup> But on an indictment for this offence he may be convicted under sec. 9 of an indecent assault. *R. v. Williams* (1893), 1 Q. B. 320.

#### AMERICAN NOTE.

<sup>1</sup> It seems to be held in America as with us that a boy being incapable of committing a rape cannot be found guilty of an assault with intent to commit a rape. *Williams v. S.*, 14 Ohio, 222; 45 Am. D. 536. *S. v. Handy*, 4 Harring. Del. 566. *P. v. Randolph*, 2 Par. Cr. 213. *S. v. Sam*, Winst. 1. 300, see however *C. v. Green*, 2 Pick. 380. *Smith v. S.*, 12 Ohio, 466; 80 Am. D. 355. Nor can a person be guilty of an assault with intent to commit a rape when the actual violation of the woman's person would not be a rape. *P. v. Quin*,

50 Barb. 128. *Rhodes v. S.*, 1 Coldw. 351. *P. v. Brown*, 47 Cal. 447. *S. v. Brookes*, 76 N. C. 1. *Johnson v. S.*, 63 Ga. 355. There seems to be no reason why a boy incapable of committing a rape should not be found guilty of an attempt to commit a rape. If the evil mind, and an act done in furtherance of the evil wish, are combined there is the attempt, though the law may hold that he could not specifically intend rape because he was personally incompetent (see vol. i. pp. 63, 195).

‘Provided that in the case of an offender whose age does not exceed sixteen years, the Court may, instead of sentencing him to any term of imprisonment, order him to be whipped; (*pp*) and if, having regard to his age and all the circumstances of the case, it should appear expedient, the Court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.

‘The Court may also order the offender to be detained in custody for a period of not more than seven days before he is sent to such reformatory school.

‘Where, upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the Court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: (*q*) Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused: Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn.’

By sec. 5, ‘Any person who (1.) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; or (2.) Unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a misdemeanor, (*r*) and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

‘Provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

‘Provided also, that no prosecution shall be commenced for an

(*pp*) In accordance with 25 & 26 Vict. c. 18, see vol. i. p. 84. The boy can only be whipped once for each offence, and with not more than twelve strokes of a birch rod.

(*q*) By sec. 9, see *post*, p. 242, note (*f*), a person indicted under this section may be convicted of indecent assault, and it has been held that the unsworn evidence of the girl may support such conviction. *R. v.*

Wealand, 20 Q. B. D. 827, and now by the Prevention of Cruelty to Children Act, 1894, such evidence is expressly made admissible on a charge of indecent assault.

(*r*) It would seem that this section does not operate to prevent a conviction for felony under 24 & 25 Vict. c. 100, s. 48, in the case of a rape on a girl between thirteen and sixteen. *R. v. Ratcliffe*, 10 Q. B. D. 74.

offence under sub-section one of this section more than three months after the commission of the offence.'

By sec. 6, 'Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, (s) (1) shall, if such girl is under the age of thirteen years, be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and (2) if such girl is of or above the age of thirteen and under the age of sixteen years, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.'

'Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.'

By 24 & 25 Vict. c. 100, s. 52, 'Whosoever shall be convicted of any indecent assault upon any female, *or of any attempt to have carnal knowledge of any girl under twelve years of age*, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.' (t)

**Proof of age of child.** — Clear and distinct evidence of the age of the child ought to be given. Thus, where, under one of the repealed enactments, the offence of carnally knowing a child under ten years of age was charged to have been committed on the 5th of February, 1832, and the only evidence of the age of the child was given by the father, who stated that in February, 1822, he went from home for a few days, and that his wife had not then been confined, and that on his return on the 9th of the same month, he found the child had been born, and he was told by his wife's mother that it had been born the day before; the grandmother was alive at the time of the trial, but the mother was dead. It was held that the evidence was not sufficient, and that the grandmother ought to have been called, for in a matter of so much importance the best evidence ought to be adduced. (x) So, on a similar indictment, under one of the repealed enactments, evidence by the child herself that she was ten years old on a particular day, her mother being ill at home, and her father being unable to state the precise time of her birth, has been held

(s) Where a girl who was illegitimate lived with her mother, and the premises, in respect of which the charge was made, were her home whereshe resided with her mother, it was held that the mother could be convicted under the section. *R. v. Webster*, 16 Q. B. D. 134.

(t) The words in italics are repealed by

48 & 49 Vict. c. 69, g. v. The accused or the wife of the accused is a competent witness, 48 & 49 Vict. c. 69, s. 20, and the unsworn testimony of a child is admissible if the offence has been committed on a child, 57 & 58 Vict. c. 41, s. 15.

(x) *R. v. Wedge*, 5 C. & P. 298. MS. C. S. G. Taunton and Littledale, JJ.

insufficient. (y) But where on an indictment, under one of the repealed enactments, for carnally knowing a child under ten years of age the mother stated that she had never kept any account of the child's age, but that her knowledge of it was derived from hearing her husband speak of it, and from conversation with him and the child, and that it had been usual to keep the birthday of the child on the 7th of February, and there was no other evidence of the age: it was objected that more certain evidence of the age ought to have been produced, and *R. v. Wedge* (z) was relied upon; Coltman, J., however, observed, that 'the evidence in that case was mere hearsay; but this evidence went much farther, and must be submitted to the jury as some evidence, though open to observation, as to the child's age.' (a)

A copy of an entry in the register book of births in a registrar's district, within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody, was held to be admissible evidence of the entry in the register book upon the mere production of such copy. Upon an indictment under the 24 & 25 Vict. c. 100, s. 51 (now repealed), for carnally knowing a girl, being above the age of ten years and under the age of twelve years, such a certified copy of an entry shewing that the child was of the age of eleven years and eight months, was held sufficient proof of the age, there being independent evidence of the identity of the child, with the name of the child entered in the book. (b) And now by sec. 17 of 57 & 58 Vict. c. 41, where a person is charged with an offence on a child who is alleged in the indictment to be of any specified age, and the child appears to the Court to be under that age, such child shall, for the purposes of the Act, be deemed to be under that age, unless the contrary is proved.

**Indecent assault.**—By the 24 & 25 Vict. c. 100, s. 52, 'Whosoever shall be convicted of an indecent assault upon any female shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years with or without hard labour.' (d)

By the 43 & 44 Vict. c. 45, 'It shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency.' It would seem, therefore, that the defence of consent is still available in cases of indecent assault on children over thirteen years of age; and the following cases may be of value.

By 48 & 49 Vict. c. 69, s. 9, 'If upon the trial of any indictment for rape, or any offence made felony by section four of this Act, the jury shall be satisfied that the defendant is guilty of an offence under section three, four, or five of this Act, or of an indecent assault, (e) but are not satisfied that the defendant is guilty of

(y) *R. v. Day*, 9 C. & P. 722, Coleridge, J.

(z) *Supra*.

(a) *R. v. Hayes*, 2 Cox, C. C. 226; *R. v. Nicholls*, 10 Cox, C. C. R. 476.

(b) *R. v. Weaver*, 43 L. J. M. C. 13.

(d) A boy under fourteen who is in-

dicted, under sec. 4, with carnally knowing a girl under thirteen may on this indictment be convicted of indecent assault. *R. v. Williams* (1893), 1 Q. B. 320.

(e) This clause is taken from 14 & 15 Vict. c. 100, s. 29.

the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanor of indecent assault. (f)

Upon an indictment under the repealed statute, the first count of which charged the prisoner with carnally knowing and abusing a girl above ten and under twelve years of age; and the second count with an assault with intent carnally to know and abuse, and the third count with a common assault: the jury negatived the first count, as there was no proof of penetration: it was contended for the prisoner, that supposing the fact to have been done by the consent of the prosecutrix, no conviction could take place on the second and third counts. The jury found that the prosecutrix had consented, and Alderson, B., directed a verdict of guilty, on the ground that the prosecutrix was by law incapable of giving her consent to what would be a misdemeanor by statute; but, upon a case reserved, all the judges thought that the proper charge was of a misdemeanor in attempting to commit a statutable offence, and that the conviction was wrong. (h) 'The ground on which the judges went in the preceding case was, that although a child between ten and twelve cannot by law consent to have connection, so as to make that connection no offence, yet, where the essence of the offence charged is an assault (and there can be in law no assault, unless it be against consent), this attempt, though a criminal offence, is not an assault; and the indictment must be for an attempt to commit a felony, if the child is under ten years old, and for an attempt to commit a misdemeanor, if the child is between the ages of ten and twelve; for it is perfectly clear that every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor.' (i)

The indictment contained one count, and charged that the prisoner in and upon a girl between the ages of ten and twelve 'unlawfully did make an assault, and her did then unlawfully and carnally know and abuse against the form,' &c. The offence of carnally knowing and abusing was disproved, but there was evidence of an indecent assault, which was left to the jury, who found the prisoner

(f) The unsworn evidence of a girl under thirteen (under the provisions of sec. 4, *ante*, p. 238) will be allowed to support a conviction for indecent assault if the indictment is under sec. 4. *R. v. Wealand*, 20 Q. B. D. 827. It was held, however, not to be admissible if the prisoner was directly indicted for indecent assault. *R. v. Paul*, 25 Q. B. D. 202. To remedy this anomalous state of the law it is expressly made admissible on this and other charges by sec. 15, of 57 & 58 Vict. c. 41. See *post*. It is doubtful whether this section would operate to make valid a verdict of common assault. The old form of indictment for rape commenced 'did on the s<sup>d</sup> A. B. make an assault' and under such an indictment it was held that a conviction for common assault was good.

See *R. v. Guthrie*, *post*, p. 243. The ground of that decision seems to be that there was a charge of assault. The assault need not however be expressly charged if it is implied in the offence. See *R. v. Taylor*, 1. R. 1 C. C. R. 194, but where there is consent there can be no assault.

(h) *R. v. Martin*, 2 Moo. C. C. R. 123. S. C. 9 C. & P. 213.

(i) Per Patteson, J., *R. v. Martin*, 9 C. & P. 215. *R. v. Meredith*, 8 C. & P. 589, Lord Abinger, C. B. *R. v. Reed*, 1 Den. C. C. 377. Nor upon an indictment for an indecent assault, *R. v. Johnson*, 10 Cox, 114, L. & C. 632, and see a remark by Bovill, C. J., in *R. v. Guthrie*, *infra*, where he says that if there is consent there cannot be an assault.



guilty of a common assault. Held, (upon a case reserved, the question for the opinion of the Court being whether the prisoner could be properly convicted on this indictment of a common assault) that the indictment charged an assault as a distinct and separable offence, and that the conviction was good. (*j*)

Where on a trial for carnally knowing a child under ten years of age, the child was too young to be examined, but a surgeon proved marks of violence which might have been inflicted by any foreign substance, and it was submitted that the prisoner might be convicted of an assault, as the consent of the child could not be presumed, by reason of its tender age: Patteson, J., said: 'That is a mistake of the law. My experience has shewn me that children of very tender age may have vicious propensities. A child under ten years of age cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality; but she can give such consent as to render the attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault.' (*k*)

Upon an indictment for attempting to abuse a child under the age of ten, containing a count for a common assault, no proof was given of the child being under ten years of age, but it appeared that the prisoner made an attempt on her, without any violence on his part, or actual resistance on hers, and it was contended that as she offered no resistance, it must be taken that she consented, and therefore the prisoner must be acquitted. Coleridge, J.: 'There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment.' (*l*)

The prisoner was indicted under the repealed enactment, 24 & 25 Vict. c. 100, s. 50, for unlawfully attempting to have carnal knowledge of a girl under the age of ten years. The evidence was, that the prisoner attempted to have carnal knowledge of the girl, but that she consented to the attempt: held, that the fact that the girl consented to the attempt was immaterial, and that the conviction of the prisoner was right. (*m*)

It will be noticed that by 43 & 49 Vict. c. 69, s. 5, whether the

(*j*) *R. v. Guthrie*, 39 L. J. M. C. 95; L. R. 1 C. C. R. 241. The prisoner was indicted under the repealed enactment, 24 & 25 Vict. c. 100, s. 51, which made the offence a misdemeanor. See *R. v. Catherall*, 13 Cox, C. C. 109.

(*k*) *R. v. Cockburn*, 3 Cox, C. C. 543. See *R. v. Roadly*, 14 Cox, C. C. 463.

(*l*) *R. v. Day*, 9 C. & P. 722, Coleridge, J.

*R. v. Lock*, 42 L. J. M. C. 5; L. R. 2 C. C. R. 10. *R. v. Woodhouse*, 12 Cox, C. C. 443, Lush, J.

(*m*) *R. v. Beale*, 35 L. J. M. C. 60; L. R. 1 C. C. R. 10; *et per* Pollock, C. B. The fact that the girl was a consenting party is quite immaterial. The consent of the girl is immaterial in an indictment charging the commission of the felony of having carnal

girl consented or not to the offence mentioned in that section being committed is immaterial. See *ante*, p. 239.

We have seen that where a prisoner is indicted for a misdemeanor, and the evidence proves that he was guilty of a felony, he is not on that account to be acquitted. (*n*) But where upon an indictment under one of the repealed enactments for having carnal knowledge of a girl above the age of ten years and under the age of twelve years, it appeared that in fact the girl was under the age of ten years; Maule, J., held that this was not a case falling within the 14 & 15 Vict. c. 100, s. 12, as that section only applied to cases of merger; e.g. the case of false pretences, where the facts proved that the false pretences had been effected by a forgery. In such a case under this section, a prisoner might, nevertheless, be convicted. But that section only applied to cases where the indictment was proved by facts amounting to a felony. The words in this indictment 'being above the age of ten years and under the age of twelve years,' were material, constituting the misdemeanor charged, and they had not been proved. (*o*)

It had been held before that enactment, that where a prisoner was indicted under one of the repealed enactments for carnally knowing a girl between ten and twelve years of age, and it was proved that he had committed a rape upon her, he was not thereby entitled to be acquitted. (*p*)

Upon an indictment under the 24 & 25 Vict. c. 100, s. 51 (now repealed), for having carnal knowledge of a girl between ten and twelve years of age, it appeared that in fact she was under ten years of age; and Maule, J., held that the indictment could not be amended under the 14 & 15 Vict. c. 100, s. 1, as the words were matter of substance. (*q*)

On an indictment for an assault with intent to abuse and carnally know, the defendant may be found guilty of the intent to abuse only. (*r*)

Where an indictment in the first count charged the prisoner with having assaulted E. R., 'an infant above the age of ten and under the age of twelve years,' with intent to carnally know and abuse her, and in the second count charged that the prisoner unlawfully did put and place the private parts of him against the private parts of the said E. R., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse the said E. R.; it was held that the second count was bad, because it did not aver that the said E. R., was between the ages of ten and twelve, and that the word 'said' did not help it, as it did not incorporate the description of E. R. contained in the first count; but that if the second count had contained the words, 'the said E. R. then and there being above the age of ten years, and under the age of twelve years,' it would have been sufficient. (*s*)

knowledge; and it must follow that consent is immaterial where the offence charged is the attempt only. See *R. v. Neale*, 1 Den. C. C. 36; *R. v. Ryland*, 11 Cox, 101; *R. v. Woodhouse*, 12 Cox, C. C. 443.

(*n*) See the 14 & 15 Vict. c. 100, s. 12, *ante*, p. 236.

(*o*) *R. v. Shott*, 3 C. & K. 206.

(*p*) *R. v. Neale*, 1 Den. C. C. 36.

(*q*) *R. v. Shott*, 3 C. & K. 206. The 14 & 15 Vict. c. 100, s. 1, will be found, *ante*, p. 54.

(*r*) *R. v. Dawson*, 3 Stark. N. P. C. 62.

(*s*) *R. v. Martin*, 9 C. & P. 215, Paterson, J. See *R. v. Cheere*, 4 B. & C. 902. 7 D. & R. 461, that the word 'said' does not incorporate a previous description. See *R. v. Waters*, 1 Den. C. C. 356.

By the 4 & 5 Vict. c. 56, s. 6, the crime of carnally knowing and abusing any girl under the age of ten years shall not 'be tried or triable before any justices of the peace at any general or quarter sessions of the peace.'

By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69): sec. 12, 'Where on the trial of any offence under this Act it is proved to the satisfaction of the Court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, it shall be in the power of the Court to divest such father, mother, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the Court may direct, and the High Court shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect.'

By sec. 16, 'This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or under any Act of Parliament other than this Act, so that a person be not punished twice for the same offence.'

By sec. 17, 'Every misdemeanor under this Act shall, in England and Ireland, be deemed to be an offence within, and subject to, the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanors," and any Act amending the same, and no indictment under the provisions of this Act shall in England be tried by any Court of quarter sessions.'

By sec. 18, 'The Court before which any misdemeanor indictable under this Act, or any case of indecent assault, shall be prosecuted or tried may allow the costs of the prosecution, in the same manner as in cases of felony, and may in like manner, on conviction, order payment of such costs by the person convicted; and every order for the allowance or payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony.'

By sec. 20, 'Every person charged with an offence under this Act or under section forty-eight and sections fifty-two to fifty-five, both inclusive, of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, or any of such sections, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury.' (t)

(t) The effect of this section together with sec. 52 of 24 & 25 Vict. c. 100, is to make a person charged with indecent assault an admissible witness on his own behalf. The prisoner was charged on an indictment containing two counts, the first for an indecent assault, the second for a common assault. He gave evidence in his defence, and was convicted of common assault. The Court (Lord Coleridge, C. J., Manisty, Hawkins,

Mathew, and A. L. Smith, JJ.) affirmed the conviction, although, if the charge had been only of common assault, the prisoner's evidence could not have been given. *R. v. Owen*, 20 Q. B. D. 829. If, however, the prisoner is charged with any offence involving bodily injury to a child, the evidence of the prisoner and his wife are admissible, 57 & 58 Vict. c. 41, s. 12, and Sched.

The procedure in all cases of offences against children is largely modified by the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), see *post*.

### SEC. III.

#### *Of procuring the Defilement of Girls under Age.*

By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), sec. 2, 'Any person who, (1.) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the Queen's dominions, with any other person or persons; or (2.) Procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute; or (3.) Procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; or (4.) Procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

'Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused.'

By sec. 3, 'Any person who, (1.) By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without the Queen's dominions; or (2.) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the Queen's dominions; or (3.) Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

'Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.'

By sec. 8, 'Any person who detains any woman or girl against her will, (1.) In or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or (2.) In any brothel, shall be guilty of a misde-

meanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

‘Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connection, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

‘No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.’

By sec. 10, ‘If it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is *bona fide* acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant (*u*) authorising any person named therein to search for, and, when found, to take to and detain in a place of safety such woman or girl until she can be brought before a justice of the peace; and the justice of the peace before whom such woman or girl is brought may cause her to be delivered up to her parents or guardians, or otherwise dealt with as circumstances may permit and require.

‘The justice of the peace issuing such warrant may, by the same or any other warrant, (*v*) cause any person accused of so unlawfully detaining such woman or girl to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law.

‘A woman or girl shall be deemed to be unlawfully detained for immoral purposes if she is so detained for the purpose of being unlawfully and carnally known by any man, whether any particular man or generally, and (a.) Either is under the age of sixteen years; or (b.) If of or over the age of sixteen years, and under the age of eighteen years, is so detained against her will, or against the will of her father or mother or of any other person having the lawful care or charge of her; or (c.) If of or above the age of eighteen years is so detained against her will. Any person authorised by warrant under this section to search for any woman or girl so detained as aforesaid may enter (if need be by force) any house, building, or other place specified in such warrant, and may remove such woman or girl therefrom.

(*u*) The act of the justice in issuing such warrants is a judicial act. *Hope v. Evered*, 17 Q. B. D. 338. *Lea v. Charrington*, 28 Q. B. D. 45.

(*v*) See *ante*, note (*u*).

‘Provided always, that every warrant issued under this section shall be addressed to and executed by some superintendent, inspector, or other officer of police, who shall be accompanied by the parent, relative, or guardian or other person making the information, if such person so desire, unless the justice shall otherwise direct.’

Since the passing of the 12 & 13 Vict. c. 76, it has been held that a conspiracy by false pretences to procure a female under the age of twenty-one years to have illicit carnal connection with a man, is an indictable misdemeanor at common law. (*w*)

(*w*) *R. v. Mears*, 2 Den. C. C. 79. The first counts were framed on the 12 & 13 Vict. c. 76, but no opinion was expressed as to them. *R. v. Delaval*, 3 Burr. 1484, was referred to by the Court.

## CHAPTER THE SIXTH.

### OF SODOMY.<sup>1</sup>

In treating of the offence of sodomy, *peccatum illud horribile, inter Christianos non nominandum*, it is not intended to depart from the reserved and concise mode of statement which has been adopted by other writers.

It appears from different authors, that in ancient times the punishment of this offence was death: (a) but it had ceased to be so highly penal, when the 25 Hen. 8, c. 6, again made it a capital offence. But this Act and the 9 Geo. 4, c. 31, are repealed.

By the 24 & 25 Vict. c. 100, s. 61: 'Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, [at the discretion of the Court,] (b) to be kept in penal servitude for life. [or for any term not less than ten years.']

Sec. 62. 'Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, [at the discretion of the Court,] (b) to be kept in penal servitude [for any term not exceeding ten years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.'] (d)

The offence consists in a carnal knowledge committed against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast. (e) With respect to the carnal knowledge necessary to constitute this offence, as it is the same that is required in the case of rape, it will be sufficient to refer to the preceding chapter. (f)

(a) But the books differ as to the mode of punishment. According to Britton, a sodomite was to be burnt, Britt. lib. 6, c. 9. In Fleta it is said, *peccantes et sodomites in terrâ vivi confodiantur*. With this the Mirror agrees; but adds, '*issint que memoire seont restraine, pur le grand abomination del fail*:' thereby consigning them, with just indignation, to shameful and eternal oblivion. Mirr. c. 4, s. 14. About the time of Richard the First, the practice was to hang a man, and drown a woman, guilty of this offence. 3 Inst. 58.

(b) The words in brackets are repealed, see *ante*, p. 204, note (g).

(d) This clause is new, except the part in common type, which is from the 14 & 15 Vict. c. 100, s. 29.

(e) 1 Hale, 689. Sum. 117. 3 Inst. 58, 59. 1 Hawk. P. C. c. 4. 6 Bac. Ab. tit. Sodomy. 3 Blac. Com. 215. 3 Burn's Just. tit. Buggery, 1 East, P. C. c. 14, s. 1, p. 480. Wiseman's case, Fortesc. 91. As to the offence by man with woman, if the case should occur, it may be proper to inquire whether the doctrine in the text is sufficiently supported by the authorities cited.

(f) *Ante*, p. 229, *et seq.*

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#### AMERICAN NOTE.

<sup>1</sup> See Fennell v. S., 32 Texas, 378. There are various statutes in the States relating to this offence, see Bishop, ii. s. 1191. There

is a doubt as to whether it is a felony or a misdemeanor, s. 1196.

In this offence as well as in rape, it has been held, since the 9 Geo. 4, c. 31, that the crime is complete on proof of penetration, and even if emission be expressly negatived. (*g*)

To constitute this offence, the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offence. (*h*) An unnatural connection with an animal of the fowl kind was agreed not to be sodomy, when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt. (*i*)

Those who are present, aiding and abetting in this offence, are all principals; (*j*) but if the party on whom the offence is committed be within the age of discretion, namely, under fourteen, it is not felony in him, but only in the agent. (*l*) But where one count charged the prisoner with committing an unnatural crime on J. Wood, and another count charged the prisoner with permitting the said J. Wood to commit an unnatural crime with him, and the facts were that the prisoner induced J. Wood, a boy of twelve years of age, to have carnal knowledge of his person, the prisoner having been the pathic in the crime, and the jury found the prisoner guilty, the judges, upon a case reserved, were unanimously of opinion that the conviction was right. (*m*) There may be accessories before and after in this offence, and the statute provides for such accessories. (*n*)

The indictment must charge that the offender *contrà naturæ ordinem rem habuit veneream, et carnaliter cognovit.* (*o*) But it is said, that this alone would not be sufficient; and that, as the statute describes the offence by the term 'buggery,' the indictment should also charge *peccatumque illud sodomiticum Anglicè dictum buggery adtunc et ibidem nequitur, felonie diabolicè ac contrà naturam commisit ac perpetravit.* (*p*)

Where an indictment alleged that the prisoner did attempt to commit an unnatural crime with 'a certain animal called a bitch;' it was objected that the description was too uncertain, as it might apply to a bitch fox, a bitch otter, or the bitch of some other animal; but Tindal, C. J., held that the description was sufficient. (*q*)

That which has been before stated with regard to the evidence and manner of proof in cases of rape, ought especially to be observed upon a trial for this still more heinous offence. When strictly and impartially proved, the offence well merits strict and impartial punishment; but it is from its nature so easily charged, and the negative so difficult to be proved, that the accusation ought clearly to be made out. The evidence should be plain and satisfactory, in proportion as the crime is detestable. (*r*)

Where on an indictment for bestiality the offence was alleged to

(*g*) R. v. Reeksphear, R. & M. C. C. R. 342. R. v. Cozins, 6 C. & P. 351, Park J. See R. v. Cox, R. & M. C. C. R. 337.

(*h*) R. v. Jacobs, R. & R. 331.

(*i*) R. v. Mulreaty, Hil. T. 1812. MS. Bayley, J. A person can be convicted of an attempt to commit an unnatural offence with a fowl. R. v. Brown, 24 Q. B. D. 357.

(*j*) 1 Hale, 670. 3 Inst. 59. Fost. 422, 423.

(*l*) 1 Hale, 670. 3 Inst. 59. 1 East, P. C. c. 14, s. 2.

(*m*) R. v. Allen, 1 Den. C. C. 364.

(*n*) See 1 Hale, 670. Fost. 422, 423.

(*o*) 1 Hawk. P. C. c. 4, s. 2. 3 Inst. 58, 59.

(*p*) Fost. 424, referring to Co. Ent. 351 b, as a precedent settled by great advice.

(*q*) R. v. Allen, 1 C. & K. 495.

(*r*) 4 Blac. Com 215.



have been committed on the 17th of December, 1842, but no complaint was made to the justices until October, 1844, and the first witness being asked why he did not mention the offence until so long a time had elapsed, said he did so, but it was not to a magistrate, and there was no confession, and nothing offered by the counsel for the prosecution to explain the delay; Alderson, B., told the jury, 'I ought not to allow this case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.' (s)

A party consenting to the commission of an offence of this kind, whether man or woman, is an accomplice, and requires confirmation. On the trial of an indictment for an unnatural offence by a man upon his own wife, she swore that she resisted as much as she could. Patteson, J., said, 'There was a case of this kind which I had the misfortune to try, and it there appeared that the wife consented. If that had been so here the prisoner must have been acquitted; for although consent or non-consent is not material to the offence, yet as the wife, if she consented, would be an accomplice, she would require confirmation; and so it would be with a party consenting to an offence of this kind, whether man or woman.' (t)

Upon an indictment for an unnatural crime, the prisoner may be convicted, under the 14 & 15 Vict. c. 100, s. 9, of an attempt to commit the same, and thereupon punished in the same manner as if he had been convicted upon an indictment for such attempt.

It is not allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him; therefore, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence. (v)

In cases where it is not probable that all the circumstances necessary to constitute this offence will be proved, it may be advisable only to prefer an indictment with intent to commit an unnatural crime. And it should be observed, that the mere soliciting another to the commission of this crime has been treated as an indictable offence. (w) By the Criminal Law Amendment Act, 1885

(s) *R. v. Robins*, 1 Cox, C. C. 114.

(t) *R. v. Jellyman*, 8 C. & P. 604. Perhaps it may be doubtful whether a wife, who consented, would be a competent witness against her husband. The cases, in which she has been held competent as a witness against him in criminal proceedings, are cases of injuries inflicted upon her against her consent. C. S. G.

(v) *R. v. Cole*, Buckingham Sum. Ass. 1810, and by all the judges, M. T. following. MS. C. C. R. 1. 1 Phil. Evid. 499.

(w) See a precedent on an indictment for such a solicitation, 2 Chit. Crim. L. 50. And for the principles and cases upon which such an indictment may be supported, see vol. i. p. 192, *et seq.*

(48 & 49 Vict. c. 69), sec. 11, 'Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.'

## CHAPTER THE SEVENTH.

### OF THE FORCIBLE ABDUCTION AND UNLAWFUL TAKING AWAY OF FEMALES ; AND OF CLANDESTINE MARRIAGES.

It appears to be the better opinion, that if a man marry a woman under age, without the consent of her father or guardian, it will not be an indictable offence at common law. (a) But children might be taken from their parents or guardians by violence, conspiracy, or other improper practices in such a way as would render the act an offence at common law, though the parties themselves might be consenting to the marriage. (b)

By the Criminal Law Amendment Act, 1885, (48 & 49 Vict. c. 69) sec. 7, 'Any person who, with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother, (bb) or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

'Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the Court or jury that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.' (c)

By 24 & 25 Vict. c. 100, s. 53, 'Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known

(a) 1 East, P. C. c. 11, s. 9, p. 458.

(b) Id. ibid. p. 459. And see in 3 Chit. Crim. L. 713, a precedent of an information for a misdemeanor, in procuring a marriage with a minor, by false allegations. R. v. Lord Grey, 3 St. Tri. 519. 1 East, P. C. c. 11, s. 10, p. 460.

(bb) It must be shewn that the girl was taken out of the charge of the person mentioned in the indictment, R. v. Henkers, 16 Cox, C. C. 257.

(c) As to the general provisions of the Act, see ante, p. 245.

by any other person, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (d) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour;] and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, *or in which she shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid*; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, *be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the Attorney-General appoint.* (e)

Sec. 54. 'Whosoever shall, by force, take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (d) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.]' (f)

It was made a question of considerable doubt, whether persons 'receiving wittingly the woman so taken against her will, and knowing the same,' were ousted of clergy by the statute of Elizabeth, when that statute was in existence. (g) But it was agreed that those who received the offender, knowingly, were only accessories after the fact, according to the rule of the common law. (h) With respect to those who were only privy to the marriage, but in no way parties or consenting to the forcible taking away, it was holden that they were not within the statute. (i)

It was no sort of excuse that the woman was at first taken away with her own consent, if she afterward refused to continue with the

(d) The words in brackets are repealed, but the punishment remains the same, see *ante*, p. 204, note (g).

(e) By the first part of this clause, the 9 Geo. 4, c. 31, s. 19, is extended to Ireland, and by the second part the 10 Geo. 4, c. 34, s. 23 (1), is extended to England. The words in *italics* in the first branch of the clause were introduced to avoid a doubt which might have been raised, whether the cases they expressly include were within the former enactments. In the second branch, the age of twenty-one is substituted for eighteen in the 10 Geo. 4, c. 34, s. 23 (1). Under the 10 Geo. 4, c. 34, s. 23 (1), the girl must have been married or defiled, and by the person taking her away. The clause is so altered as to make it correspond with the 9 Geo. 4, c. 34, s. 19, in both respects. The last part of the clause is framed on the 10 Geo. 4, c. 34, s. 23 (1), and extended to England. It is enlarged so as to embrace property that may come to the woman after the marriage; and the Court of Chancery is

empowered to settle the property in such a manner as it deems fit, instead of its being vested in trustees for the separate use of the wife alone, which was all that the 10 Geo. 4, c. 34, s. 23 (1), directed. The Court, therefore, may, in its discretion, settle the property on the issue of the marriage, and in default of such issue, on any relatives of the wife.

(f) This clause is new in England, and was taken from the 10 Geo. 4, c. 34, s. 22 (1), and 5 Vict. Sess. 2, c. 28, s. 15 (1). It provides a very proper protection to women who happen to have neither any present nor future interest in any property. See 12 Co. 100. *Burton v. Morris*, Hob. 182; Cro. Car. 485.

(g) 1 Hale, 661. 1 East, P. C. c. 11, s. 2, pp. 452, 453.

(h) 1 Hale, 661. 1 Hawk. P. C. c. 41, s. 9. 3 Inst. 61. St. P. C. 44. 1 East, P. C. c. 11, s. 2, pp. 452, 453.

(i) Fulwood's case, Cro. Car. 488, 489. 1 Hawk. P. C. c. 41, s. 10.

offender, and was forced against her will ; for till the time when the force was put upon her, she was in her own power ; and she might from that time as properly be said to be taken against her will, as if she had never given any consent. (*j*) Getting a woman inveigled out by confederates, and then detaining and taking her away, was a taking within the statute. (*k*) The taking alone did not constitute the offence under the repealed statute, 3 Hen. 7, c. 2, and it was necessary that the woman taken away should have been married or defiled by the misdoer, or by some other, with his consent. (*l*) But the new enactment makes the taking away or detaining a woman, *with intent* to marry or carnally know her, a complete offence. And under the repealed statute, 3 Hen. 7, c. 2, it was decided, that if the woman were under force at the time of taking, it was not at all material whether she were ultimately married or defiled with her own consent or not ; on the ground that an offender should not be considered as exempted from the provisions of the statute, by having prevailed over the weakness of a woman, whom he got into his power by such base means. (*m*) And it was also decided that a marriage would be sufficient to constitute the offence, though the woman was in such fear at the time that she knew not what she did. (*n*)

Upon the repealed statute, 3 Hen. 7, c. 2, where a woman was taken away forcibly in one county, and afterwards went voluntarily into another county, and was there married or defiled, with her own consent, it was holden that the fact was not indictable in either county ; on the ground that the offence was not complete in either, but that if by her being carried into the second county, or in any other manner, there was a continuing force in that county, the offender might be indicted there, though the marriage or defilement ultimately took place with the woman's own consent. (*o*)

The doctrine that there must have been a continuance of the force into the county where the defilement took place, was recognised and acted upon in the following case, by which a great deal of public interest was excited. The prisoners, Lockhart Gordon, a clergyman, and Loudon Gordon, his brother, were indicted in the county of Oxford upon the repealed statute, for the forcible abduction of Rachael Lee. Certain evidence was given at the trial on the part of the prosecution. Lawrence, J., after having inquired of the counsel for the prosecution, whether they had any further evidence to offer of force in the county of Oxford, and been told by them that they had not, said, that he was of opinion the case should not proceed any farther. The learned judge then addressed himself to the jury, and told them, that, in order to constitute the offence with which the prisoners were charged, there must be a forcible taking, and a continuance of that force into the county where the defilement takes place, and where the indictment is preferred ; that in the

(*j*) 1 Hawk. P. C. c. 41, s. 7. Cro. Car. 485.

(*k*) R. v. Brown, 1 Ventr. 248.

(*l*) Wakefield's case, 2 Lew. 1. The parties were convicted of a conspiracy to commit a violation of the repealed statutes, 3 Hen. 7, c. 2, and 4 & 5 P. & M. c. 8.

(*m*) 1 Hale, 660. 1 Hawk. P. C. c. 41,

s. 8. Fulwood's case, Cro. Car. 485, 493. Swendsen's case, 5 St. Tri. 450, 464, 468.

(*n*) Fulwood's case, Cro. Car. 482, 484, 488, 493. The prisoners were found guilty, and sentenced to be hanged.

(*o*) Fulwood's case, Cro. Car. 485, 488. 1 Hale, 660. 1 Hawk. P. C. c. 41, s. 11. 1 East, P. C. c. 11, s. 3, p. 453. See *supra*.

present case, though there appeared clearly to have been force used for the purpose of taking the prosecutrix from her house [which was in Middlesex], yet, it appeared also, that in the course of the journey she consented, as she did not ask for assistance at the inns, turnpike gates, &c., where she had opportunities; and that, as she was unable to fix times or places with any precision, this consent probably took place before the parties came into the county of Oxford; and that they must therefore acquit the prisoners. (*p*)

Upon an indictment for abduction on the 9 Geo. 4, c. 31, s. 19 (now repealed), it must have been proved that the prisoner took away the woman from motives of lucre, but his expressions relative to her property were evidence that he was actuated by such motives. (*q*)

It was resolved that an indictment for this offence upon the repealed statute, ought expressly to set forth that the woman taken away had lands or goods, or was heir apparent, and that the taking was against her will; and that it was for lucre; and also that she was married or defiled; such statement being necessary to bring a case within the preamble of that statute, to which the enacting clause clearly referred in speaking of persons taking away a woman 'so against her will' (*r*) But it was said not to have been necessary to state in the indictment, that the taking was with an intention to marry or defile the party, because the words of the statute did not require such an intention, nor did the want of it in any way lessen the injury. (*s*) In an indictment, however, upon the 24 & 25 Vict. c. 100, the allegation as to the intent will be necessary.

An indictment (*ss*) charged that F. Burrell fraudulently allured, took away, and detained Jane Burrell out of the possession of her mother and W. S. Hyder, he then having the lawful care and charge of her, she being under the age of twenty-one years, and having a present legal interest in real estates, with intent to marry, &c., and H. R. Burrell was charged with feloniously aiding, &c., to commit the felony. The prisoners were paternal uncles of Jane Burrell, who was sixteen years old, and entitled to real estates of the value of £50 a year. Her mother had first married the brother of the prisoners, and after his death she had married W. S. Hyder. Jane lived with her mother and stepfather till she went to school in January, 1862, where she remained till August, 1862, when she returned to her mother's, and in October she went to another school, whence she returned to her mother's on December 20, in the afternoon; she stayed half an hour, and then left the house alone. About nine o'clock that evening she returned, and stayed till ten, when she again left without her mother's knowledge or consent. She returned the next morning, and stayed with her mother about two hours, and then went away without her mother knowing whither. In fact, she

(*p*) *R. v. Lockhart and Loudon Gordon*, cor. Lawrence, J., Oxford Lent Ass. 1804. This case is set out at length in the fourth edition of this work.

(*q*) *R. v. Barratt*, 9 C. & P. 387.

(*r*) 1 Hawk. P. C. c. 41, s. 4. 1 Hale, 660. 4 Blac. Com. 209. 12 Co. 21, 100.

(*s*) Fulwood's case, Cro. Car. 488, *ante*,

p. 884. It is said, however, in 1 Hale, 660, that the words *ed intentione ad ipsam maritandum* are usually added in indictments on this statute, and that it was safest so to do.

(*ss*) The indictment was under 24 & 25 Vict. c. 100, s. 53.

went to the house of her uncle, H. R. Burrell, and she continued there till January 19, 1863. She continued to pay visits to her mother for an hour or two nearly every day till the 19th of January. In the interval between her coming home from the first and her going to the second school, it had been arranged, at her own desire, in consequence of her not living happily with her stepfather and mother, that she should live with her mother's mother and brother. When she came back for the Christmas holidays, she wished to remain with her mother, but the latter insisted on her abiding by her own choice to go to her grandmother's for the holidays, and would not consent to her staying with her at her stepfather's house. On this she went to the house of H. R. Burrell. Her mother, as soon as she discovered that her daughter was there, desired her to come to her house, and refused to let her have her clothes unless she did so. On the 19th of January F. Burrell and Jane Burrell left together by railway, and were married the next day at Plumstead. These occurrences took place under such circumstances as fully warranted the jury in finding that Jane Burrell was allured and taken away by F. Burrell, with intent to marry her, and that H. R. Burrell aided in the committing of this act. It was objected — 1, that there was no evidence that F. Burrell had *fraudulently* allured away Jane Burrell; 2, that there was no evidence that she was taken out of the possession of her mother; 3, that the indictment charged that she was taken out of the possession of her mother and W. S. Hyder, he having then the lawful charge of her, and that it was necessary to prove that she was in his possession as thus alleged, as well as of her mother; but the only proof was that the guardianship of her person and copyhold estate had been granted to him when she was admitted as tenant of her copyhold estate. Upon a case reserved, it was urged — 1, that there was no fraudulent alluring away, and that the mere alluring away was not sufficient; 2, there was no evidence that she was taken out of the possession of her mother; 3, that the stepfather had not the lawful care of the girl; he had no general guardianship of her person. In *Ratcliffe's case*, 3 Rep. 396, it was held that the consent of the stepfather was wholly immaterial; but here the indictment alleged the stepfather to have the lawful custody. [Pollock, C. B., 'We are all of opinion that the indictment would be supported by shewing that the girl was taken out of the possession and against the will of the mother. The rest might be struck out as surplusage.'] For the Crown it was urged — 1, that in this case the statute did not require any evidence of fraud, but, if it did, there was sufficient evidence of fraud; 2, the girl was in the possession of the mother; she had never abandoned the possession, and the mere right of possession was sufficient. Pollock, C. B., 'The Court is divided in opinion on the facts of the case. The opinion of the majority is that the facts do not bear out the prosecution, or, in other words, that the crime has not been established against the prisoners. There is no difference of opinion as to the law of the case.' (t)

As to the woman taken away and married being a witness, see *post*, 'Evidence.'

(t) *R. v. Burrell*, L. & C. 354.

By the 24 & 25 Vict. c. 100, s. 55, 'Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.' (*tt*)

A man took out of the possession and against the will of her father, a girl of the age of fourteen, who, however, looked much older than sixteen; and the jury found as a fact that before the man took her away she had told him she was eighteen, and that he *bona fide* believed such statement, and that such belief was reasonable:—Held, that he was guilty of the misdemeanor within this section, though he did not know that the girl was under the age of sixteen, and even believed that he knew she was over that age—Brett, J., dissenting. (*u*)

(*tt*) This clause is taken from the 9 Geo. 4, c. 31, s. 20, and 10 Geo. 4, c. 34, s. 24 (1). The provisions as to evidence, presumption of age, &c., of the 57 & 58 Vict. c. 41, see *post*, apply to proceedings under this section.

(*u*) *R. v. Prince*, L. R. 2 C. C. R. 154. 44 L. J. M. C. 122. 13 Cox, C. C. 138. This case was not argued for the prisoner. The judgment of Brett, J., the dissenting judge, will well repay perusal. An extract from it is here given. 'Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or *mens rea*. Then comes the question, what is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime, if the result were as he anticipated, but in which the result may not improbably end by bringing the offence within a more serious class of crime. As if a man strike with a dangerous weapon with intent to do grievous bodily harm, and kills. The result makes the crime murder. The prisoner has run the risk. So if a prisoner do the prohibited acts without caring to consider what the truth is as to facts. As if a prisoner were to abduct a girl under sixteen, without caring to consider whether she was in truth under sixteen. He runs the risk. So if he, without abduction, defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed, he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe, to be the facts, would, if true, make his acts no criminal offence at all. It may be true to say that

the meaning of the word "unlawfully" is that the prohibited acts be done "without justification or excuse." I, of course, agree that if there be a legal justification there can be no crime. But I come to the conclusion that a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England.

Bramwell, B. 'What the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, can be said to be in another's possession and in that other's care or charge. No argument is necessary to prove this. It is enough to state the case. The Legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in any one's possession, nor in the care or charge of any one. In those cases he would not know he was doing the act forbidden by the statute, an act which if he knew she was in possession and in care or charge of any one, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention if done without lawful cause.' The subject has recently been considered in *R. v. Tolson*, 23 Q. B. D. 168, in which it was held that a *bona fide* belief on reasonable grounds in the death of a husband was a good defence to an indictment for bigamy although the second marriage took place within seven years from the husband's disappearance. The judgments fully discussed and approved the decision in *R. v. Prince*. It should be



The prisoner met in the street a girl under the age of sixteen years, and persuaded her to go with him to a neighbouring city. He there seduced her, and afterwards, on the same day, accompanied her back, and parted with her in the street where he had met her. The girl lived with her parents at home, and immediately returned there. The prisoner made no inquiries, and had no knowledge of whether the girl's parents were even living or not, but he did not believe she was a prostitute:—Held (Pigott, B., *dubitante*), that there was no evidence to support a conviction under the 24 & 25 Vict. c. 100, s. 55. (v)

If the girl, while living with her father, leaves his house for a mere temporary purpose, intending to return to it, she is still in his possession within the meaning of the statute; and if when so out of the house the defendant induces her to run away with him, he is guilty of the misdemeanor created by this statute. (x)

Although it seems that a man is not bound to return a girl under sixteen to her father's custody when she has left home without any inducement, and come to him, (y) yet if he has at any time held out an inducement to her, and she, acting upon that, comes to him at a time unexpected by him, and he then induces her to continue away from her father's custody, he is guilty. (z)

On an indictment for taking A. Pollard, a girl under sixteen, out of the possession of her father, it appeared that the prisoner lived near them, and had known her a considerable time. Six months previously, the father, hearing that the girl went to the prisoner's house, remonstrated with him for encouraging her to go there; the prisoner replied that he did not want girls for the purpose of intercourse, as he was old and under medical treatment. One Sunday she left her father's house, to go, as she said, to the Sunday school, but did not return. In fact, she went to the prisoner's house, and was found there a month afterwards. A youth proved that the prisoner had told him to bring that young girl if he could. He had told a policeman that he had the girl to do his work, as he had no servant. The girl stated that she had for two years been in the habit of going to his house occasionally, and that he had tried to persuade her to come and live with him, and had promised her a new dress if she came, and that when she came he promised to provide for her in his will, and persuaded her to sleep with him.

remembered that these two decisions are on different sections, and it would seem to have been held that sec. 55 to some extent imputes a *mens rea* to persons transgressing it. See also as to *mens rea* the judgment of Wright, J., in *Sherras v. De Rutzen* (1895), 1 Q. B. 918.

(v) *R. v. Hibbert*, L. R. 1 C. C. R. 184, 38 L. J. M. C. 61, *et per* Bovill, C. J. 'In the case before us there is no statement or finding of the fact that the prisoner knew, or had reason to know, that the girl was under the charge of her father or mother, or any other lawful guardian. Circumstances might exist to negative the presumption that she was in any such care, as if the girl were upon the town, though that does not

appear to be the case here. So, on the other hand, there might be circumstances from which it might be inferred that the prisoner knew, or had reasonable cause to know, that the girl was under such care; but no such facts are found by the case to have existed. In the absence of any such finding, we think that the conviction should be quashed.' See *R. v. Green*, 3 F. & F. 274, and see *per* Brett, B., in *R. v. Prince*, *ante*, p. 258, note (u).

(x) *R. v. Mycock*, 12 Cox, C. C. 28, *per* Willes, J.

(y) *R. v. Miller*, 13 Cox, C. C. 179.

(z) *R. v. Christian Oliver*, 10 Cox, C. C. 402.

Pollock, C. B., directed the jury that if they believed that the prisoner by promises or persuasion enticed the girl away from her father, and so got her out of his possession, and into his own, they should find him guilty, otherwise if she came without any previous inducement or enticement. (*a*)

*Cases upon Repealed Statutes.*

The construction upon some parts of the repealed statutes, 4 & 5 Ph. & M. c. 8, and 9 Geo. 4, c. 31, may still be worthy of observation.

It was decided, that the taking away a *natural daughter* under sixteen years of age, from the care and custody of her putative father, was an offence within the repealed Act 4 & 5 Ph. & M. c. 8. (*b*) It was also holden that a mother retained her authority, notwithstanding her marriage to a second husband; and that the assent of the second husband was not material. (*c*) In the last case it was also ruled, that the fourth section of the statute extended only to the custody of the father, or to that of the mother where the father had not disposed of the custody of the child to others. (*d*) In a case where a widow, fearing that her daughter, who was a rich heiress, might be seduced into an improvident marriage, placed her under the care of a female friend, who sent for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she attained the age of sixteen, and without the consent of her mother, who was her guardian; it was holden, that in order to bring the offence within the statute, it must appear that some artifice was used; that the elopement was secret; and that the marriage was to the disparagement of the family. (*e*) But on this case it has been remarked, that no stress appears to have been laid upon the circumstance of the mother having placed the child under the care of the friend, by whose procurance the marriage was effected; and that it deserves good consideration before it is decided that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or guardian did not consent, was not within the statute; for that then every schoolmistress might dispose, in the same manner, of the children committed to her care. (*f*) It has been said that there must be a continued refusal of the parent or guardian; and that if they once agree it is an assent within the statute, notwithstanding any subsequent dissent; (*g*) but this was not the point in judgment; and it has been observed that it wants further confirmation. (*h*)

It seems that it was no legal excuse for this offence that the defendant made use of no other seduction than the common bland-

(*a*) *R. v. Robb*, 4 F. & F. 59. See *R. v. Meadows*, 1 C. & K. 399.

(*b*) *R. v. Cornforth*, 2 Str. 1162. 1 Hawk. P. C. c. 41, s. 14. *R. v. Sweeting*, 1 East, P. C. c. 11, s. 6, p. 457.

(*c*) *Ratcliffe's case*, 3 Co. 39.

(*d*) *Id. Ibid.*

(*e*) *Hicks v. Gore*, 3 Mod. 84. 1 Hawk. P. C. c. 41, s. 11.

(*f*) 1 East, P. C. c. 11, s. 6, p. 457. By the fraud the temporary guardian loses all right to the possession of the child. See *Roscoe's Crim. Ev.* 8th ed. 265.

(*g*) *Calthrop v. Axtel*, 3 Mod. 169.

(*h*) 1 East, P. C. c. 11, s. 6, p. 457.

ishments of a lover, to induce the lady secretly to elope and marry him, if it appeared that the father intended to marry her to another person, and so that the taking was against his consent. (*i*)

And the prohibition being general, the want of a corrupt motive was no answer to the criminal charge. (*j*) It seems that if an indictment or information upon this statute stated, that the defendant, 'being above the age of fourteen years, took one A., then being a virgin unmarried, possessed of moveable goods, and seised of lands of great value, out of the custody of her mother, &c.,' the word *being* was a sufficient averment of the facts which follow. (*k*)

On an indictment under the repealed enactment 9 Geo. 4, c. 31, s. 20, for the abduction of a girl under sixteen years of age, it appeared that the prisoner pretended that he had heard of a place for the girl; the mother said that the child was too young, being only between ten and eleven years of age; but the prisoner said she was quite old enough, for he only wanted her to go to Southampton with a lady who was ill, to nurse a baby which she had, and to go on errands. The prisoner called the same day and took the child away, saying the lady was too ill to come herself. He did not, however, take her to any lady, but kept her with him from Monday till Friday, and slept with her every night, and then took her home. The father proved that he parted with the child on the representation that she was to go to live with a lady, which he believed to be true. On the part of the Crown, it was urged that the consent of the father having been obtained by the fraudulent representations of the prisoner, was no consent at all; for the prisoner, it was urged that the abduction was not complete, for the child was brought back; if this were an abduction, any seducing away of a girl for an hour would be an abduction; there was no intention shewn to deprive the parents of the child. Gurney, B., left it to the jury to say whether the father was induced to part with the possession of the child by the fraudulent representations made by the prisoner. (*l*)

A person might be guilty of an offence under sec. 20 of 9 Geo. 4, c. 31, though what was done was with the girl's consent, (*m*) even though the proposal to go away emanated from the girl. (*n*)

Where on a similar indictment it appeared that the girl was between fifteen and sixteen years of age, and the prisoner had for several months corresponded with her, and paid her the attentions of a lover, though he was a married man, and had endeavoured to persuade her to leave her home, where she was living with her

(*i*) *R. v. Twisleton and others*, 1 Lev. 257. S. C. 1 Sid. 337. 2 Keb. 32. 1 Hawk. P. C. c. 41, s. 10.

(*j*) 1 East, P. C. c. 11, s. 9, p. 459. See *R. v. Booth*, 12 Cox, C. C. 231, and *R. v. Tinkler*, 1 F. & F. 513.

(*k*) *R. v. Moor*, 2 Lev. 179. S. P. R. v. Boyal, 2 Burr. 832. 1 Hawk. P. C. c. 41, s. 9.

(*l*) *R. v. Hopkins*, C. & M. 254, Feb. 1842. The prisoner was convicted, and the point would have been reserved had not the prisoner been convicted and sentenced on another indictment. The mother proved that she would have let the child go with the prisoner if he had told her that she

was to go and live with him as his servant; but Gurney, B., held that this could not affect the case.

(*m*) Secs. 55 and 56 of the new Act correspond with secs. 20 and 21 of the 9 Geo. 4, c. 31.

(*n*) *R. v. Robins*, 1 C. & K. 456, Sum. Ass. 1844. Atcherley, Sergt., afterwards stated that he had mentioned the case to Tindal, C. J., and that he was of opinion that the direction to the jury was right, and that there was a taking of the girl within sec. 20. See *R. v. Prince, ante*, p. 258. *R. v. Biswell*, 2 Cox, C. C. 279, Sum. Ass. 1847.

parents, and ultimately prevailed upon her to meet him at a place in the village where they were both living, which accordingly she did, when they left the village together. There was no suggestion of any force or fraud used by the prisoner in inducing the girl to consent to elope with him. It was urged that there was no taking within the meaning of the Act, as the girl went voluntarily with the prisoner, and *R. v. Meadows* (o) was relied upon; for the Crown, *R. v. Robins* and *R. v. Biswell* (p) were cited. Maule, J.: 'If the construction apparently put upon the statute in *R. v. Meadows* be the right construction, the Act can hardly ever be violated, except in the case of children in arms. It rarely or never happens that the abductor takes away a girl of fourteen or fifteen in his arms, or upon his back; so that such an interpretation would make the statute inoperative. The law throws a protection about young persons of the sex and within the age specified by the statute. It has been determined by the legislature, that at that age young females are not able to protect themselves, or give any binding consent to a matter of this description. It is therefore quite immaterial whether the girl abducted consent or not; if her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed.' (q)

Upon a similar indictment, it appeared that the prisoner had stated to the father that he intended to emigrate to America, and a short time before his departure he had privately persuaded the girl, who was between twelve and thirteen, to go with him to America, and on the morning of his departure he had secretly told her to put her things in a bundle, and to walk to a place where he would meet her; she did so, and the prisoner, having parted with her father in a road, met her at the place appointed, and they travelled together to London, where he was apprehended, and then said he had paid the girl's passage to London, and was going to take her to America. For the prisoner it was urged that as the girl went voluntarily there was no taking within the meaning of the statute, and *R. v. Meadows* was cited. (r) *R. v. Robins* (s) was cited on the other side, and it was stated that Maule, J., at a previous assize, had declined to act on *R. v. Meadows*. Coleridge, J., overruled the objection, and told the jury that the girl was in the father's possession while in his house, although he was not actually in it; that the taking need not be by force, nor against the girl's will; and that if the prisoner by persuasion induced her to leave her father's roof against his will, in order to her going with him to America, the case was within the statute; and, upon a case reserved, it was held that the conviction was right. In a case like the present the taking need

(o) 1 C. & K. 399. In this case, per Parke, B.: 'It is quite evident that the Legislature made a distinction between an offence under sec. 20 of the 9 Geo. 4, c. 31, and under sec. 21; and I am inclined to think, that to bring a case within sec. 20 [which is similar to sec. 55 of 24 & 25 Vict. c. 100], there must be an actual taking or causing to be taken away; and a mere de-

coying or enticement away, which would be an offence within sec. 21, would not constitute one under sec. 20.'

(p) *Supra*, p. 261.

(q) *R. v. Kipps*, 4 Cox, C. C. 167, Spr. Ass. 1850. See *infra*, note (t).

(r) *Supra*.

(s) *Supra*, p. 261.

not be by force, actual or constructive, and it is immaterial whether or not the girl consents. The Act was passed to protect parents and others having the lawful charge or custody, and it is therefore immaterial whether the taking be with or without the consent of the girl. And as to the taking of the girl out of the possession of the father, a manual possession is not necessary; if the girl be a member of the family, and under the father's control, there is a sufficient possession. If a girl leaves her father's house for a particular purpose, with his sanction, she cannot legally be said to be out of his possession. Here the father had possession until the very act of taking. (*t*)

Where on a similar indictment against a man and a woman, it appeared that the girl had become acquainted with the female prisoner, and at her house met the male prisoner, and she and the prisoners met frequently, and at last she left her father's house, as she said, to go for a walk, at the same time saying that she should return in an hour, but she did not return; and the same evening her brother went to the house of the female prisoner, who denied having seen her; and it was afterwards discovered that she had left the same night, and she was afterwards found in a low lodging together with the male prisoner; the girl had taken some wearing apparel to the house of the female prisoner the day before she left home, and she had advised her to go away with the male prisoner; it was contended that there was nothing to shew that the girl's going away was not entirely voluntarily. Wightman, J., told the jury, that 'this offence is complete under the statute which creates it without any reference to the object for which the girl may be taken. You must be satisfied that the girl was under sixteen years of age, and that her father was unwilling that she should go away, and it must be assumed to be so, if it appears that, had he been asked, he would have refused his consent. You must also be satisfied that the prisoners, or one of them, took the girl out of the possession of her father. For this purpose a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's house. If, however, the going away was entirely voluntary on the part of the girl, the prisoners would not be guilty of an offence under this statute.' (*u*)

Where on a similar indictment the prisoner was proved to have lodged in the house of the girl's father, and he and the girl became engaged, and he induced her to go with him to a Roman Catholic chapel, where they were married; but she immediately returned to her father's house, and continued to live there as before; and

(*t*) *R. v. Mankletow*, Dears. C. C. 152, Spr. Ass. 1853. 'Supposing the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But supposing she conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of the father's possession.' Per Parke, B., *ibid.* On *R. v. Meadows* being cited, Jervis, C. J., observed that 'the girl, by voluntarily

going from her father's house, may have severed the possession of the father, and so could not be said to be taken out of the possession of her father. I do not find that in *R. v. Kipps* that point was brought before my Brother Maule's mind;' and at the end of his judgment he added, 'I do not think the case of *R. v. Kipps* interferes at all with the decision in *R. v. Meadows*.'

(*u*) *R. v. Handley*, 1 F. & F. 648. Sum. Ass. 1859.

the marriage had never been consummated; the father did not know of the marriage till two or three weeks afterwards; it was urged that the girl had never been taken out of her father's possession within the meaning of the Act; it was answered that the marriage without the father's consent was an abduction within the meaning of the Act, and after the marriage the father had no legal control over the girl. It was held that the case was within the Act; the girl could not be considered to be in the father's possession, although she was in his house; because she was in the lawful possession of her husband, and the father never could have the custody of her in the same sense as before her marriage. The distance she was taken, and the time she was kept away, were immaterial, her husband having power to take her away whenever he liked, and her whole relationship to her father being altered by the marriage. (v)

Where on a similar indictment it appeared that the prisoner was well known to the girl, and she had on a former occasion slept with him a whole night; and that he asked her if she would mind going out with him on the Sunday, and she answered 'no;' and on the Sunday, in fulfilment of the engagement, she went and met the prisoner, and they went to London together, and spent three days in visiting places of public entertainment, sleeping together at night, and on Wednesday morning, on getting up, the prisoner said to her, 'I'll go to work, and you go home:' they separated, and the girl went home; the father swore that his daughter was absent without his knowledge and against his will. The jury found that the father did not consent, and that the prisoner knew he did not consent, and that the prisoner took the girl away with him in order to gratify his passions, and then allowed her to return home, and did not intend to keep her away permanently. Upon a case reserved upon the question, whether, on the facts so found, any offence had been committed under the statute, Erle, C. J., delivered judgment: 'We are of opinion that the conviction must be affirmed. The statute was passed for the protection of parents, and for preventing unmarried girls from being taken out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such cases can prevent the person taking her away from being guilty of the offence created by this section. The difficulty which we have is to say what constitutes a taking out of the possession of the father. The taking away might be consistent with the possession of the father, if the girl went away with the party intending to return in a short time; but when a person takes a girl away from the possession of her father, and keeps her away against his will for a length of time, as in this case, keeping her away from her home for three nights, and cohabiting with her during that time, we think the evidence justified the jury in finding the taking to be a taking out of the possession of the father within the meaning of the statute. The prisoner took the girl away from under her father's roof, and placed her in a situation quite inconsistent with the father's possession. In our judgment, therefore, the jury were justified in their verdict by the evidence before them, which we

(v) *R. v. Baillie*, 8 Cox, C. C. 238. Jul. 1859. The Common Sergeant and Recorder.

consider to be the point submitted to us, although the prisoner did not intend the taking to be permanent, but when his lust was gratified intended to cast the girl from him. We limit our judgment to the facts of this particular case. It may be that a state of facts might arise upon which the offence would be complete in law when the girl passed her father's threshold, as where she is taken away with the intention of keeping her away permanently; but we mean it to be understood, that, although we affirm this conviction, we do not intend to say that a person would be liable to conviction under the section if it should appear that the taking was intended to be temporary only, or for a purpose not inconsistent with the relation of father and child. It is sufficient for us to say that in this case the conviction was justified by the evidence.' (w)

Where on a similar indictment it appeared that the girl was the younger sister of the prisoner's deceased wife, and had lived in his house up to the time of his wife's death, but on that occasion another married sister had caused her to be placed under the care of another woman, and no improper motive was alleged against the prisoner, he having alleged as his reason for taking the child away that he had promised her father on his death-bed to take care of her; Cockburn, C. J., told the jury that it was clear that the prisoner had no right to take the child out of the woman's custody. But as no improper motive was suggested, it might be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise he had made to her father, and that he did not suppose he was breaking the law when he took the child away. If the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to be acquitted. (x)

Where on a similar indictment it appeared that the girl was more than fifteen, but in appearance three years older and very prepossessing, and lived with her mother, a widow; on the evening of the alleged abduction she left her mother's house at nine o'clock to spend the night at a married sister's, but, joining company with another girl, they went to a public-house, and met the two prisoners, and from thence went to another public-house, where they met the prisoners again by appointment, and thence to the farming premises of one of the prisoners, where they remained till four o'clock in the morning; it was then proposed that they all should go to London, which they did, and stayed the day there, and one of the prisoners slept with the girl, and the other with her companion, and returned the next day. The mother swore that it was not by her consent that the girl had gone away, and that she had inquired everywhere for her without success; but the girl stated that she occasionally went to dances at public-houses, and was occasionally out late at night without any one to look after her, and that her mother on these occasions left the door on the latch, or came down and let her in; that the prisoner who slept with her was not the first man who had

(w) *R. v. Timmins*, Bell, C. C. 276.  
Only argued for the Crown, Nov. 1860.

(x) *R. v. Tinkler*, 1 F. & F. 513, Spr.  
Ass. 1859.

had connection with her. Cockburn, C. J., directed the jury that there was no case against the other prisoner; and as to this prisoner, if they thought that the mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public-houses, this was not a case that came within the intent of the statute; but was one where what had occurred, though unknown to her, could not be said to have happened against her will. (*y*)

A father is entitled to the custody of his child until it attains the age of sixteen, unless there be some sufficient reason to the contrary. (*z*)

### *Clandestine Marriages.*

Many of the provisions of the Marriage Act, 4 Geo. 4, c. 76, will be found in Vol. I. **BIGAMY.** (*a*) The twenty-first section enacts, 'That if any person shall, after the first day of November, 1823, solemnise matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, (*aa*) unless by special licence from the Archbishop of Canterbury; or shall solemnise matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same: or if any person falsely pretending to be in holy orders, shall solemnise matrimony according to the rites of the Church of England, every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported (*b*) for the space of fourteen (*c*) years, according to the laws in force for transportation of felons, provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed.' (*d*)

The mere fact of institution to a living is no evidence that the person instituted is in orders, nor does it put him in the position of a person who has received holy orders, nor make him compellable to celebrate marriages. The question for the jury is, first, whether the prisoner has ever acquired the position and status which made him an ordained minister, and if not, whether he knew at the time he performed the ceremony that he had never been ordained. (*dd*)

(*y*) *R. v. Primelt*, 1 F. & F. 50, Spr. Ass. 1858. *R. v. Frazer*, 8 Cox, C. C. 446, Spr. Ass. 1861. Pollock, C. B., after consulting Williams, J.

(*z*) *Ex parte Barford*, 8 Cox, C. C. 405. The girl had been privately examined by Cockburn, C. J.

(*a*) Vol. i. p. 659.

(*aa*) The hours are extended to three in the afternoon by 49 & 50 Vict. c. 14.

(*b*) Penal servitude by the 20 & 21 Vict. c. 3, s. 2.

(*c*) And not less than three years.

(*d*) This section seems incidentally repealed by the 6 & 7 Will. 4, c. 85, except as to the offence of pretending to be in holy

orders, and solemnising matrimony according to the rites of the Church of England. See Lonsd. Cr. L. 140. The 4 Geo. 4, c. 76, contains no provisions for the punishment of principals in the second degree and accessories. But the principals in the second degree are punishable like the principals in the first degree. The Act does not extend to the marriages of any of the royal family (sec. 30), nor to any marriages amongst Quakers or Jews, where both the parties to any such marriage shall be Quakers or Jews (sec. 32). C. S. G.

(*dd*) *R. v. Ellis*, 16 Cox, C. C. 469, per Pollock, B.



By the Marriage Act, 6 & 7 Will. 4, c. 85, s. 89, 'Every person who after the said first day of March (1837), shall knowingly and wilfully solemnise any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion, according to the usages of the Jews), and every person who in any such registered building or office shall knowingly and wilfully solemnise any marriage in the absence of a registrar of the district in which such registered building or office is situated, shall be guilty of felony : (e) and every person who shall knowingly and wilfully solemnise any marriage in England after the said first day of March (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid, [or if the marriage is by licence, within seven days after such entry,] (f) or after three calendar months after such entry, (g) shall be guilty of felony.' (g)

Sec. 40. 'Every superintendent registrar who shall knowingly and wilfully issue any certificate for marriage after the expiration of three calendar months after the notice shall have been entered by him as aforesaid, or any certificate for marriage by licence before the expiration of seven days after the entry of the notice, or any certificate for marriage without licence before the expiration of twenty-one days after the entry of the notice, (h) or any certificate, the issue of which shall have been forbidden as aforesaid by any person authorised to forbid the issue of the registrar's certificate, or who shall knowingly and wilfully register any marriage herein declared to be null and void, and every registrar who shall knowingly and wilfully issue any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the registrar as aforesaid, or who shall knowingly and wilfully solemnise in his office any marriage herein declared to be null and void, shall be guilty of felony.'

Sec. 41. 'Every prosecution under this Act shall be commenced within the space of three years after the offence committed.'

Sec. 42. 'If any person shall knowingly and wilfully intermarry after the said first day of March, under the provisions of this Act, in any place other than the church, chapel, registered building, or office, or other place specified in the notice and certificate aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without licence, in case a licence is necessary under this Act, or in the absence of a registrar or superintendent registrar, where the presence of a registrar or superintendent registrar is necessary under this Act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void : pro-

(e) See the 19 & 20 Vict. c. 119, s. 9, &c.

(f) The part within brackets is repealed by 37 & 38 Vict. c. 35.

(g) This is a felony for which no punish-

ment is provided ; it is therefore punishable under the 7 & 8 Geo. 4, c. 28, s. 8, and 1 Vict. c. 90, s. 5.

(h) See the 19 & 20 Vict. c. 119, s. 9, &c.

vided always, that nothing herein contained shall extend to annul any marriage legally solemnised according to the provisions of an Act passed in the fourth year of His late Majesty George the Fourth, entituled, "An Act for amending the laws respecting the solemnisation of marriages in England."

By the 1 Vict. c. 22, s. 3, 'Every superintendent registrar, who shall knowingly and wilfully issue any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the superintendent registrar, as provided by the said Act for marriages, (*j*) or who shall knowingly and wilfully solemnise, or permit to be solemnised in his office any marriage in the last recited Act declared to be null and void, shall be guilty of felony.'

The 12 Geo. 3, c. 11, confirms the prerogative of the Crown to superintend and approve of the marriages of the royal family. (*l*) The first section enacts, 'That no descendant of the body of King George the Second, male or female (other than the issue of princesses who may have married, or may hereafter marry, into foreign families), shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs, or successors, signified under the great seal, and declared in council (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the privy council); and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.' (*m*) Provision is then made for a marriage, without the royal consent, of any such descendant, being above twenty-five years of age, after notice to the privy council, and the expiration of twelve months after such notice; in case the two Houses of Parliament do not before that time expressly declare their disapprobation of the marriage. (*n*) The third section of the statute enacts, 'That every person who shall knowingly or wilfully presume to solemnise, or to assist, or to be present at the celebration of any marriage, with any such descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had and obtained, except in the case above mentioned, shall, being duly convicted thereof, incur and suffer the pains and penalties, ordained and provided by the statute of provision and *præmunire* made in the sixteenth year of the reign of Richard the Second.'

Upon the trial of any offence mentioned in this chapter the defendant may, under the 14 & 15 Vict. c. 100, s. 9, be convicted of an attempt to commit the same, and thereupon may be punished as if he had been convicted on an indictment for such attempt.

(*j*) 6 & 7 Will. 4, c. 85.

(*l*) 1 East, P. C. c. 13, s. 7, p. 473.

(*m*) See the Sussex Peerage Case, 11 Cl. & F. 85.

(*n*) Sec. 2.

## CHAPTER THE EIGHTH.

### OF KIDNAPPING, AND CHILD-STEALING.

#### SEC. I.

##### *Of Kidnapping.*

THE stealing and carrying away, or secreting of any person, sometimes called *kidnapping*, is an offence at common law, punishable by fine and imprisonment. (a)

The forcible abduction or stealing and carrying away of any person, by sending him from his own country into some other, or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is properly called kidnapping, and is an offence of a very aggravated description.<sup>1</sup> Its punishment at common law is, however, no more than fine and imprisonment; though, as has been remarked concerning it, the offence is of such primary magnitude that it might well have been substituted upon the roll of capital crimes, in the place of many others, which are there to be found. (b)

The 31 Car. 2, c. 2 (the celebrated *Habeas Corpus* Act), makes provision against any inhabitant of Great Britain being sent prisoner to foreign countries. The twelfth section enacts, that no subject of this realm, being an inhabitant or resiant of England, Wales, or the Town of Berwick-upon-Tweed, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier or into parts, garrisons, islands, or places beyond the seas, within or without the dominions of His Majesty. Such imprisonment is then declared to be illegal; and an action for false imprisonment is given to the party, with treble costs, and damages not less than five hundred pounds. The section then proceeds thus:—‘And the person or persons who shall knowingly frame, contrive, write, seal or countersign, any warrant for such commitment, detainer, or transportation, or shall so commit, detain,

(a) 1 East, P. C. c. 9, s. 3, pp. 429, 430. R. v. Grey, T. Raym. 473. Comb. 10. The pillory was also part of the punishment

before the 56 Geo. 3, c. 138. The 43 Eliz. c. 13, was repealed by the 7 & 8 Geo. 4, c. 27.

(b) 1 East, P. C. c. 9, s. 4, p. 430.

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#### AMERICAN NOTE.

<sup>1</sup> It is said in America that a man would be justified in resisting to the death an attempt to forcibly carry him out of his country. See Bishop, i. s. 868 (3), citing *Creighton v. C.*, 84 Ky. 103, 108, and *Williams v. S.*, 44 Ala. 41. Kidnapping need only be the sending of the person to any other place. See *S. v. Rollins*, 8 N. H. 550, and it is suggested that a mere intent to

carry away is sufficient. Bishop, ii. s. 750. It is not clear how far fraud or threats are sufficient, without any force being used, to constitute the offence of kidnapping under American statutes. See Bishop, ii. s. 752. A United States statute makes it an offence to bring into America any person kidnapped in any other country. Stat. U. S. 1874, c. 464.

imprison, or transport, any person or persons, contrary to this Act, or be any ways advising, aiding, or assisting therein,' being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within England, &c., or the dominions thereunto belonging, and shall incur the pains, &c. of the statute of *præmunire*, 16 R. 2, and shall be incapable of any pardon from the King of such forfeitures or disabilities. There are some exceptions in the Act relating to the transportation of felons: and the sixteenth section provides, that offenders may be sent to be tried where their offences were committed, and where they ought to be tried. The seventeenth section enacts, that prosecutions for offences against the Act must be within two years after the offence committed, if the party grieved be not then in prison; and if he be in prison, then within two years after his decease, or delivery out of prison, which shall first happen.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 187, 'The master of or any other person belonging to a British ship, shall not wrongfully force on shore and leave behind, or otherwise wilfully and wrongfully leave behind, in any place, on shore or at sea, in or out of Her Majesty's dominions, a seaman or apprentice to the sea service before the completion of the voyage for which he was engaged or before the return of the ship to the United Kingdom, and if he does so he shall in respect of each such offence be guilty of a misdemeanor.'

By sec. 188, 'The master of a British ship shall not discharge a seaman or apprentice to the sea service abroad, or leave him behind abroad, ashore or at sea, unless he previously obtains, endorsed on the agreement with the crew, the sanction, or in case of leaving behind, the certificate' of a superintendent, British consular officer, or two merchants resident at the place, stating the cause of the seaman being left behind, and the section continues: 'If a master acts in contravention of this section, he shall be guilty of a misdemeanor; and in any legal proceeding for the offence, it shall lie on the master to prove that the sanction or certificate was obtained or could not be obtained.'

Where on an indictment on the 5 & 6 Will. 4, c. 19, against a master of a vessel for leaving one of his crew at Quebec, in Lower Canada, for the defence a certificate stating that the defendant appeared before E. B. a commissioner for carrying into effect the imperial Act of the 5 & 6 Will. 4, c. 19, respecting merchant seamen, and being duly sworn, said that the seaman in question did desert from the vessel while at Quebec, and was then absent without leave, it was held that this certificate was insufficient. It did not state the facts as ascertained by the proper authority, but merely proved that the captain swore certain things before him. The Act required the proper officer to certify that the truth is so, not that another deposed to it. (c)

The indictment alleged that the defendant was master of a merchant ship called the *Sarah Charlotte*, belonging to a subject of the United Kingdom, namely, J. H., and that E. W. and H. G. were persons belonging to the crew, and on board the said ship, duly engaged

(c) *R. v. Smison*, 1 Cox, C. C. 188, Commr. Bullock, after consulting the Recorder.

to serve in a voyage, which was not then completed; and that one E. P. was Her Majesty's consul at Bahia, and that the defendant at Bahia unlawfully, wilfully, and wrongfully did leave the said E. W. and H. G. behind on shore, before the completion of their voyage, on the plea that they were not in a condition to proceed on the voyage, he not having obtained a previous certificate in writing of the said consul or of any such functionary of their not being in such condition, there being time to obtain such certificate. (d) It appeared from the evidence for the prosecution, that E. W. and H. G. were both ill when the vessel put into Bahia on her voyage, and went ashore, and saw the doctor, who said they were not sick enough to be left on shore, and go to the hospital, as they wished; they then went to the English consul, who said he could do nothing without the doctor's certificate, and the captain then said they might take his boat and fetch their things ashore, and keep out of the consul's sight till the ship had sailed. They did so, and the captain sent them some dollars by a passenger. For the defence it was shewn that E. W. and H. G. asked the captain's leave to go ashore to see the doctor or consul, as they did not wish to stay in the ship, not being able to do their duty, and that the captain said he could not put them on shore till he had seen the consul; that they went ashore, and came again and asked for their clothes, and the mate, believing that they had got their discharge, though they did not say so, let them have them; that they were very ill, and if they had not gone on shore at Bahia and got medical advice, one of them would have died; that the consul refused them a certificate, and the passenger, thinking it was a cruel refusal on his part, gave them the dollars out of his own pocket, to relieve them on shore, and did not pay them as the agent of the captain. The collector of customs of the port of Harwich produced a certificate of the registry of the ship with the name James Howard in it, which he knew to be his signature, but did not see him write it: the declaration was signed by him. He knew Howard personally. He lived near Harwich, and was the proprietor of several ships. He did not know where he was born: he was a British subject; he knew he was so by the declaration which he had made. He believed him to be an Englishman. Cresswell and Coleridge, JJ., were of opinion, first, that the allegation of ownership was a material allegation, and must be proved as laid; secondly, that the 41st (e) and 42nd sections of the 5 & 6 Will. 4, c. 19, did not create separate offences, but that they should be taken together, and were intended to shew that certain conduct on the part of the seaman will not excuse the captain, unless he produce the required certificate; and therefore, thirdly, that on this indictment, which charged the defendant with wrongfully and wilfully leaving behind him two persons belonging to his crew, the only answer he could give would be either to prove the certificate, or shew the impossibility of obtaining it; and not having done either of these things, if the jury believed the evidence, he must be found guilty. (f)

(d) The count concluded with an averment that the defendant was found within the jurisdiction of the Central Criminal Court.

(e) *Quære*, 40th.

(f) *R. v. Dunnett*, 1 C. & K. 425.

## SEC. II.

*Of Child-Stealing.*

By the 24 & 25 Vict. c. 100, s. 56, 'Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (g) to be kept in penal servitude for any term not exceeding seven years [and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour,] and, if a male under the age of sixteen years, with or without whipping: provided that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof.' (h)

Upon the trial of any offence contained in the preceding section, the defendant may, under the 14 & 15 Vict. c. 100, s. 9, be convicted of an attempt to commit the same, and thereupon may be punished as if he had been convicted on an indictment for such attempt.

A person may be convicted under this section even though the child is no longer in his custody and there is no evidence to shew where it is. (i). The force or fraud must, however, be perpetrated on the child himself. (j)

(g) The words in brackets are repealed, but the punishment remains the same, see *ante*, p. 204, note (g).

(h) This clause is taken from the 9 Geo. 4, c. 31, s. 21, and 10 Geo. 4, c. 34, s. 25 (1). The word 'unlawfully' is substituted for 'maliciously,' which was inaccurately used in the former enactments. The age of the child is extended from ten to fourteen years, and 'guardian' is introduced; and in the

proviso words are added to include the mother of an illegitimate child. The provisions of 57 & 58 Vict. c. 41 (see *post*) as to presumption of age, evidence, &c., apply to proceedings under this section.

(i) *R. v. Johnson*, 15 Cox, C. C. 481.

(j) *R. v. Barrett*, 15 Cox, C. C. 658, A. L. Smith, J. This decision seems to need reconsideration.

## CHAPTER THE NINTH.

OF CONSPIRACIES AND ATTEMPTS TO MURDER; OF MAYHEM,  
OR MAIMING; AND OF DOING OR ATTEMPTING SOME GREAT  
BODILY HARM.

### SEC. I.

#### *Of Conspiracies to Murder.*

By the 24 & 25 Vict. c. 100, s. 4, 'All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, [at the discretion of the Court,] (a) to be kept in penal servitude for any term not more than ten [and not less than three] years, [or to be imprisoned for any term not exceeding two years, with or without hard labour].'

This clause is new in England, but in Ireland, under the 10 Geo. 4, c. 34, ss. 8, 9, the offences mentioned in it were capital felonies; and in the Bill, as it passed the House of Lords, the offences were continued as felonies, but liable to penal servitude for life; the House of Commons, however, altered them to misdemeanors, punishable with ten years' penal servitude, and as all the offences specified in this clause appear to be misdemeanors at common law, (c) the effect of this clause is merely to alter the punishment of them.

Conspiracies to murder have very rarely come before any tribunal in England: but there is one very notorious case, where a number of persons, in order to procure the rewards given by Acts of Parliament for apprehending robbers on the highway, concocted a pretended charge of robbery against one Kidden, who was convicted and executed for it upon the evidence of two of them, and these persons were afterwards tried for his murder and convicted, but not punished under this indictment; (d) but they were convicted on an indictment for a conspiracy, and sentenced to be set in the pillory twice, imprisoned for seven years, and, until they found sureties for their good behaviour for three years afterwards. (e)

(a) The words in brackets are repealed, but the punishment remains the same, see *ante*, p. 204, note (g).

(c) *R. v. Higgins*, 2 East, R. 5.

(d) See *ante*, p. 23.

(e) *R. v. Macdaniel*, Fost. 121. It is not clear whether the indictment was for a conspiracy to murder Kidden, or another person, or to pervert the course of justice.

The words 'whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not,' were introduced in order to make it perfectly clear that this clause included a case where the conspiracy was to murder a foreigner in a foreign country. The words were introduced *ex abundanti cautela* only, and this clause must never be cited as any legislative declaration that a conspiracy in England to murder a foreigner in a foreign country is not a conspiracy indictable at common law, or that the killing of a foreigner in a foreign country, under such circumstances as would amount to murder if the killing were in England, is not murder in contemplation of the law of England. (*f*)

There is no doubt that it is not essential that the conspiracy should have been formed in England or Ireland. The Act, by sec. 68, includes conspiracies on the sea; and even if that section did not exist, British subjects who conspire on the high seas are triable by the common law in any county in England where any act in furtherance of such conspiracy is done by any one of them, or by their innocent agent; for the crime of conspiracy, amounting only to a misdemeanor, may, like high treason, be tried wherever one distinct overt act of conspiracy is in fact committed. Where the only acts personally done by the defendants were done either on the high seas at Brassa Sound, or in the Isle of Shetland, and the only acts done in Middlesex, where they were indicted, were done by innocent agents in furtherance of the conspiracy of the defendants, it was held that they were properly tried in Middlesex. (*g*) So where the individual actings of some of the conspirators were wholly confined to other counties than Middlesex, but the conspiracy against all was proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different counties, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of them in prosecution of the conspiracy in Middlesex, where the trial was had. (*h*) Now, at common law, the

(*f*) The introduction of the words in question makes it unnecessary to discuss either of those questions; but, having with no small care examined all the authorities to be found on the subject, I may be pardoned for saying that it is perfectly clear to me that the killing of any person anywhere in the world, whether on land or sea, under such circumstances that if the killing had been in England it would have amounted to the crime of murder, has ever been murder in contemplation of the law of England. Wherever a murder has taken place in England or on the narrow seas, the Court of King's Bench, or Courts of oyer and terminer or gaol delivery, have had jurisdiction to try it by a jury. Wherever a murder has taken place on the high seas, the Court of Admiralty had jurisdiction to try it according to the civil law; and wherever a murder has taken place on land abroad, the Court of the Constable and Marshal had jurisdiction to try it according to the civil law. By sundry statutes in and since the time of Hen. 8, the jurisdiction

to try murders committed on the high seas and on land abroad, has been conferred on certain tribunals with the aid of a jury; but none of these statutes either alters, or professes to alter, the nature of the offence; on the contrary, they all treat it as murder, and only provide a different mode of trial. The doubt which has arisen, and not unnaturally, seems to have sprung from supposing that, because the Common Law Courts, trying all offences by the aid of a jury, had only jurisdiction over offences committed in England or on the narrow seas, therefore murder and other offences against the law of nature and nations were no offences at all in the eye of the law of England. The answer is, that the Courts of Admiralty and of the Constable and Marshal did try such offences from the earliest times; and, therefore, it is clear that they always were offences in the eye of the law of England. C. S. G.

(*g*) R. v. Brisac, 4 East, R. 163.

(*h*) R. v. Bowes, cited in R. v. Brisac, *supra*.



criminal jurisdiction of counties was local. They were like different kingdoms; (i) yet in conspiracy the jury could, as we have seen, at common law take cognisance of acts done on the high seas or in another county, provided there were an overt act done in the county where the indictment was preferred: and it would therefore seem that if there were a conspiracy on land abroad, a jury might try it in any place in England where any overt act in pursuance of it was done. Lastly, suppose A. in England conspired with B. abroad to commit a murder, and A. did some overt act in England, it would seem that both A. and B. might be tried in England, if B. was a British subject; and that if B. was not a British subject, A. might, nevertheless, be tried where he did that overt act; for such an act would be an act coupled with a criminal intent, and as such indictable, within the principle laid down in *R. v. Higgins*, (j) even if it should be objected that a conspiracy between A. in England and B., a foreigner, abroad, was not a conspiracy within the criminal law of England. And as a letter written and sent, but intercepted, is an overt act in treason; (k) so a letter may be an overt act in conspiracy. In consequence of some doubts that have been uttered, it may be well to add that every foreigner, except an ambassador, whilst in England, is quite as much amenable to our criminal law as a native subject. By the 32 Hen. 8, c. 16, s. 9, (l) every alien, who shall come into this realm, 'shall be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same;' (m) and where a statute speaks of the King's subjects, it extends to aliens; for though they are not the King's natural-born subjects, they are the King's subjects when in England by local allegiance. (n)

M. was indicted under the above section. The alleged encouragement and endeavour to persuade to murder was the publication and circulation by him of an article written in German in a newspaper published in London exulting in the recent murder of the Emperor of Russia, and commending it as an example. The jury were directed that if they thought he intended to, and did, encourage any person to murder any other person, whether a subject of Her Majesty or not, and whether within her dominions or not, and that such encouragement was the natural effect of the article, they should find him guilty. It was held that such direction was correct, although the encouragement was not addressed to any person in particular. (nn)

If a question should be raised whether, if one of the conspirators were to commit the murder, and the others were indicted as accessories before the fact, it might not be objected that they could only be tried for a misdemeanor under this clause; the answers are, first, that this clause has only altered the punishment, and created no new

(i) *R. v. Weston* under Penyard, 4 Burr. R. 2507, per Lord Mansfield, C. J.

(j) 2 East, R. 5; and see *R. v. Bull*, ante, p. 161.

(k) *R. v. Hensley*, 1 Burr. 642.

(l) The 32 Hen. 8, c. 16, is repealed by the 26 & 27 Vict. c. 125. There is no doubt that the above clause was introduced to do away with questions which had previously

arisen. See the Year Book, 13 Edw. 4, p. 9, pl. 5, as to some of such questions. See the 33 & 34 Vict. c. 14.

(m) And see *Ex parte Barronet*, 1 E. & B. 1.

(n) 1 Hale, P. C. 542; *Courteen's case*, Hob. 270.

(nn) *R. v. Most*, 7 Q. B. D. 244.

offence; and at common law the power to prosecute for a misdemeanor was not only never suggested as in any way preventing a prosecution for felony, but the best authorities always held that the misdemeanor merged in the felony. But, secondly, nothing can be clearer than that if a statute create a misdemeanor, and something be done in pursuance of, and in addition to, that misdemeanor, which amounts to a felony, all persons who have done acts which would make them accessories before the fact to that felony, may be indicted as such (putting aside merger altogether), on the plain ground that they are totally different offences. It has never been suggested, that because wounding with intent to murder is made a felony, therefore a man who killed another by wounding him could not be indicted for murder. There is no such thing as merger of one felony by another; and when, as is often the case, the same acts constitute several felonies, either at common law or by statute, the prosecutor may indict for any of them. Thus, in cases of real murder, indictments for manslaughter have often been preferred, and so also indictments for administering poison where death has ensued.

Upon an indictment for soliciting A. B. to murder C. D., the evidence was that the prisoner gave poison to A. B. to administer to C. D., and which A. B. accordingly did; but C. D. having taking part of it, discovered the fact in time to save his life: the jury found him guilty, believing that the poison had been delivered to C. D. with intent to poison him, and that the solicitation was to that effect: the judges held both indictment and conviction proper, in treating the prisoner as a principal soliciting, and not as an accessory before the fact. (*o*)

Where on an indictment against three prisoners and others unknown, for a conspiracy to murder, one of them was tried first, because they severed in their challenges, and the evidence tended to affect him and the others named in the indictment, and made a case to go to the jury as to a conspiracy by the three: but there was no evidence to shew that any other person was engaged in the conspiracy: and the jury found the prisoner guilty, and on his being brought up for judgment it was objected that the prisoner ought not by law to have been tried alone: the Court overruled the objection, and passed sentence on the prisoner: and, upon a case reserved, it was contended that the judgment was irregular: for if the others were acquitted, the prisoner could not be guilty of conspiracy: that there was a contradiction on the face of the record, for the others had not been found guilty, and until they were his guilt was not proved: and that the judgment ought to have been respited. But it was held that there were no grounds on which the judgment should be respited or arrested. (*p*)

(*o*) *R. v. Murphy, Jebb, C. & P. C.* 315. *Hayes' Dig.* 631.

(*p*) *R. v. Ahearne, 6 Cox, C. C. 6.* *R. v. Cooke, 5 B. & C.* 538, was much relied upon in this case; see vol. i. p. 513. It has always appeared to me perfectly clear that even if on a subsequent trial the others were acquitted, it would in no way affect the previous verdict or judgment. The jury who convict a prisoner who is tried alone for con-

spiracy, must have been satisfied both that he conspired with the other, and that the other conspired with him, and the subsequent acquittal is in no respect necessarily inconsistent with that verdict; for it may have proceeded on the want or failure of evidence. Suppose a defendant pleaded guilty, or was convicted on his own written confession, it might well be that the person with whom he had admitted he had con-

As to how far the acts or words of one conspirator are evidence against another, see Vol. I. CONSPIRACY.

SEC. II.

*Of Attempts to Murder : of Mayhem or Maiming ; and of doing or attempting some great bodily harm.*

Attempts to commit murder appear to have been considered as felonies in the earlier ages of our law ; but that doctrine did not long prevail ; and such attempts became, and still remain, at common law, punishable only as high misdemeanors. (g)<sup>1</sup> Where an indictment is preferred for an assault with an intent to murder, it seems that the attempt as laid must be fully established, in order to support the indictment : thus, where a defendant was so charged in the first count of the indictment, Lord Kenyon, C. J., being of opinion, upon the facts given in evidence, that if death had ensued it would only have been manslaughter, directed the jury to acquit the defendant upon that count. (r)

*Mayhem*, or the maiming of persons, was probably at one time an offence at common law of the degree of felony ; as the judgment was *membrum pro membro*. (s) But this judgment afterwards went out of use ; partly because the law of retaliation is at best an inadequate rule of punishment ; and partly because, upon a repetition of the offence, the punishment could not be repeated. (t) The offence, therefore, appears to have been considered in later times, as in the nature of an aggravated trespass ; and the only judgment which now remains for it at common law is fine and imprisonment. (u) It is, however, a misdemeanor of the highest kind, and spoken of by Lord Coke as the greatest offence under felony. (v)

A bodily hurt whereby a man is rendered less able in fighting, to defend himself or to annoy his adversary, is properly a maim at com-

pired might be acquitted, and it would be absurd that he should thereby be exonerated. It is a fallacy to suppose that there is any inconsistency on the face of a record in such a case ; there never is any inconsistency on the face of a record containing an indictment, verdict, and judgment, where any state of facts can be suggested which is consistent with the statements in that record. C. S. G. (g) Staund. 17. 1 East, P. C. c. 8, s. 5, p. 411. R. v. Bacon, 1 Lev. 146. 1 Sid. 230, where the defendant, having been convicted for lying in wait to kill Sir Harbottle Grimstone, the Master of the Rolls, was sentenced to fine and imprisonment, the finding surety for his good behaviour for life, and acknowledging his offence at the bar of the Court of Chancery. And see

two precedents of indictments at common law, for misdemeanors in attempting to murder by poison, 3 Chit. Crim. L. 796.

(r) R. v. Mitton, Adjourned Sittings at Westminster, Oct. 1788. 1 East, P. C. c. 8, s. 5, p. 411. And see Stark. Evid. tit. 'Assaults,' and the cases there cited.

(s) 3 Inst. 118. 1 Hawk. P. C. c. 55, s. 3. 4 Blac. Com. 206.

(t) 4 Blac. Com. 206.

(u) Id. ibid. 1 Hawk. P. C. c. 55, s. 3. 1 East, P. C. c. 7, s. 1, p. 393. But it is observed, that perhaps mayhem by castration might have continued an offence of higher degree, as all our old writers held it to be felony. 4 Blac. Com. 206.

(v) Co. Lit. 127 a.

AMERICAN NOTE.

<sup>1</sup> See McCoy v. S., 3 Eng. 451. Cole v. S., 5 Eng. 318. Sharp v. S., 19 Ohio, 369.

mon law. (*w*) Therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eyes or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims; but the cutting off his ear,<sup>1</sup> or nose, or the like, are not held to be maims at common law; because they do not weaken a man, but only disfigure him. (*x*)<sup>2</sup> In order to found an indictment of mayhem the act must be done maliciously, though it matters not how sudden the occasion. (*y*)

It is laid down that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted; and, on conviction, fined and imprisoned. (*z*) For as the life and members of every subject are under the safeguard and protection of the King; so they are said to be *in manu regis*, to the end that they may serve the King and country when occasion shall require. (*a*)

It should seem that there can be no accessories before the fact in mayhem, at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject. (*b*) For, supposing the offence to be in the nature of an aggravated trespass only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but that all persons concerned therein, if guilty at all, are principals. (*c*) It does not appear to have been anywhere supposed, that there can be accessories after the fact in mayhem. (*d*)

Attempts to murder, maiming, and the doing or attempting great bodily harm, were made highly penal by the enactments of several statutes now repealed. The 9 Geo. 1, c. 22, commonly called the *Black Act*, and which made the maliciously shooting at any person a capital offence, and the 26 Geo. 2, c. 19, s. 1, relating to the beating or wounding persons shipwrecked with intent to kill them, &c., or putting out false lights to bring a ship into danger, were repealed by

(*w*) Staund. P. C. 3. Co. Lit. 126. 3 Inst. 62, 118. 1 Hawk. P. C. c. 55, s. 1. 4 Blac. Com. 205. 1 East, P. C. c. 7, s. 1, p. 393.

(*x*) 1 Hawk. P. C. c. 55, s. 2. 4 Blac. Com. 205, 206. 1 East, P. C. c. 7, s. 1, p. 393. Bac. Ab. *Mayhem* (A).

(*y*) 1 East, P. C. c. 7, s. 1, p. 393.

(*z*) 1 Hawk. P. C. c. 55, s. 4, and Co. Lit. 127 *a*, where Lord Coke says, 'In my circuit, anno 1 *Jacobi regis*, in the county of Leicester, one Wright, a young, strong, and lustie rogue, to make himself impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand; and both of them were indicted, fined, and ransomed.'

(*a*) Co. Lit. 127 *a*. Bract. lib. 1, fol. 6, Pasch. 19 Edw. 1, cor. Reg. Rot. 36, Northt.

(*b*) Lord Hale states that there are no accessories before in mayhem, but that they are in the same degree as principals, 1 Hale, 613. Hawkins, on the contrary, says, that it seems there may be accessories before the fact in mayhem. 2 Hawk. P. C. c. 29, s. 5. In 1 East, P. C. c. 7, s. 7, p. 401, there is a learned argument, to shew that the latter opinion proceeded on a mistake.

(*c*) Vol. i. p. 174.

(*d*) 1 Hawk. P. C. c. 55, s. 13, and 2 Hawk. P. C. c. 29, s. 5. 1 East, P. C. c. 7, s. 7, p. 401.

#### AMERICAN NOTES.

<sup>1</sup> As to cutting off the ear in America, which seems to be a mayhem within the words "a member of the human body," see *S. v. Girkin*, 2 Dev. 425. *S. v. Abram*, 10 Ala. 928. *S. v. Harrison*, 30 La. An. 1329.

*P. v. Golden*, 62 Cal. 542. *Godfrey v. P.*, 63 N. Y. 207. *Slattery v. S.*, 41 Tex. 619.

<sup>2</sup> See *S. v. Abram*, 10 Ala. 928. *Chick v. S.*, *Humph.* 164.

the 7 & 8 Geo. 4, c. 27. The 5 Hen. 4, c. 5, relating to cutting tongues and putting out eyes; the 22 & 23 Car. 2, c. 1, called the *Coventry Act*, by which malicious maiming was made a capital offence; the 9 Anne, c. 16, which made it capital to attempt to kill, assault, wound, &c., a privy counsellor, and the 43 Geo. 3, c. 58, commonly called *Lord Ellenborough's Act*, were repealed by the 9 Geo. 4, c. 31, which, as well as the 1 Vict. c. 85, is now repealed.<sup>1</sup>

By the 24 & 25 Vict. c. 100, s. 11, 'Whosoever shall administer to or cause to be administered to or to be taken by any person (e) any poison or other destructive thing, or shall by any means whatsoever (f) wound or cause any grievous bodily harm to any person, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (g) to be kept in penal servitude for life [or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (h)

Sec. 12. 'Whosoever, by the explosion of gunpowder, or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 11. (i)

(e) It seems that these sections (11 to 15) do not apply to attempts to commit suicide by wounding, &c. *R. v. Burgess*, 32 L. J. M. C. 55, L. & C. 258.

(f) Under the repealed Act, 1 Vict. c. 85, the wound must have been inflicted with some instrument in order to come within that statute. See *Jennings' case*, 2 Lew. 130, *Alderson, B. R. v. Payne*, 4 C. & P. 558. *R. v. Withers, R. & M. C. C. R. 294. R. v. Smith*, 8 C. & P. 173. *R. v. McLoughlin*, 8 C. & P. 635. *R. v. Briggs, R. & M. C. C. R. 318. R. v. Sheard*, 7 C. & P. 846. *R. v. Lancaster*, 2 Stark. Ev. 692. *R. v. Shadbolt*, 5 C. & P. 504. *R. v. Duffill*, 1 Cox, C. C. 49. *Elmsley's case*, 2 Lew. 126, where the question arose whether the bite of a dog was within the 9 Geo. 4, c. 31. In the present Act, as the words 'by any means whatsoever' are placed immediately before the word wound, it is immaterial whether the wound be inflicted by a weapon or not. See *R. v. Bullock*, 37 L. J. M. C. 47.

(g) The words in brackets are repealed, but the punishment except as to solitary confinement remains the same. See *ante*, p. 204, note (g).

(h) This clause is framed from the 7 Will. 4 and 1 Vict. c. 85, s. 2. As the general term 'wound' includes every 'stab' and 'cut,' as well as other wounds, that general term has alone been used in these Acts. All, therefore, that it is now necessary to allege in the indictment is, that the prisoner did wound the prosecutor; and that allegation will be proved by any wound, whether it be a stab, cut, or other wound. The words 'any grievous bodily harm' are inserted instead of 'any bodily injury dangerous to life,' in order to render the clause more comprehensive. If in any case it be doubtful whether the facts bring it within this clause, but there is evidence that the acts were done with intent to murder, a count on sec. 15, *post*, p. 280, alleging an attempt to murder, should be added. As to the introduction of the words, 'cause to be administered to,' see note to sec. 14, *infra*.

(i) This clause is taken from the 9 & 10 Vict. c. 25, s. 2. In this and the next section, the words 'unlawfully and maliciously' are omitted as unnecessary, and 'intent to commit murder' substituted for 'intent to murder any person.'

#### AMERICAN NOTE.

<sup>1</sup> Some old statutes, such as the 5 Hen. 4, c. 5, and 22 & 23 Car. 2, c. 1, though repealed in England, are still in force as common law in America; but generally speaking some State statute is substituted for the old English Statutes. See *Bishop*, ii. ss. 1002, 1003, 1004. The New York statute has the words "from premeditated

design," so that there must be proved to be a specific intent to maim, and an act done in the heat of an affray is not sufficient. *Foster v. P.*, 50 N. Y. 598. *Godfrey v. P.*, 63 N. Y. 207. *Burke v. P.*, 4 Hun, 481. *Slattery v. S.*, 41 Tex. 619. *Molette v. S.*, 49 Ala. 18.

Sec. 13. 'Whosoever shall set fire to any ship or vessel, *or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein*, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 11. (*j*)

Sec. 14. 'Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison, or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms (*k*) at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, *whether* any bodily injury be effected *or not*, be guilty of felony, and being convicted thereof shall be liable,' as in sec. 11. (*l*)

Sec. 15. 'Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder (*m*) shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 11. (*n*)

A prisoner was indicted under sec. 14, for that he 'feloniously did attempt to discharge certain loaded arms, to wit: a certain pistol loaded, &c., at and against one W. B., with intent in so doing feloniously, wilfully, and of malice aforethought to kill and murder the said W. B.' The facts were that the prisoner drew a loaded pistol from his pocket with intent to murder W. B., but before he had time to do anything further the pistol was snatched from his hand. Stephen, J., held on the authority of *R. v. St. George*, 9 C. & P. 483, and *R. v. Lewis*, 9 C. & P. 523, that he could not be convicted under sec. 14, and he was accordingly convicted of an offence under sec. 15. The Court (Lord Coleridge, C. J., Huddleston and Pollock, BB.,

(*j*) This clause is taken from the 7 Will. 4 and 1 Vict. c. 89, s. 4. The words in *italics* were introduced for the same reason as it was made felony to set fire to goods, &c., in buildings.

(*k*) A revolver of which the particular chamber which will next be discharged is unloaded, is a loaded arm if other chambers are loaded. Per Charles, J., 17 Cox, C. C. 104. See sec. 19, *post*, p. 282.

(*l*) This clause is taken from the 7 Will. 4 and 1 Vict. c. 85, s. 3. Where the prisoner delivered poison to a guilty agent, with directions to him to cause it to be administered to another in the absence of the prisoner, it was held that the prisoner was not guilty of an attempt to administer poison within the 7 Will. 4 and 1 Vict. c. 85, s. 3; *R. v. Williams*, 1 Den. C. C. 38; and the words 'attempt to cause to be administered to or to be taken by,' were introduced in this section to meet such cases. The words 'whether any bodily injury be effected or not,' are substituted for, 'although no bodily injury be effected,' in order to prevent an objection which might possibly have been raised on an indictment under the

former clause, if it had appeared that any bodily injury had been effected. C. S. G.

(*m*) See note (*h*), *ante*, p. 279.

(*n*) This section is entirely new, and contains one of the most important amendments in these Acts. It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains, or machinery used in lowering miners into mines have been injured with intent that they may break and precipitate the miners to the bottom of the pit. So also all cases where steam engines are injured, set on work, stopped, or anything put into them, in order to kill any person, will fall within it. So also cases of sending or placing infernal machines with intent to murder. See *R. v. Mountford*, R. & M. C. C. 441, 7 C. & P. 242. Indeed every attempt to murder, which perverted ingenuity may devise, or fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life. In any case where there may be a doubt whether the attempt falls within the terms of any of the preceding sections, a count framed on this clause should be added. C. S. G.

Maistry and Stephen, JJ.) held that the offence was not under sec. 15, and quashed the conviction. Now since *R. v. St. George* has been expressly overruled by *R. v. Duckworth* (1892), 2 Q. B. 83, there can be no doubt that a prisoner in such a case would be rightly convicted of an offence under sec. 14.

Upon an indictment under the 1 Vict. c. 85, for attempting to discharge a loaded fire-arm at a person, it was held that there must have been some act proved to have been done by the prisoner to shew that he did attempt to discharge the fire-arm, and merely presenting it was not sufficient. (*nn*) In this case, however, the fire-arm was in such a condition that it could not have been discharged. It was, however, held that where a person tried to discharge a loaded pistol, but was prevented, he could not be convicted. (*o*) This case has, however, been expressly overruled, and now the law seems to be that if a man does any act (such as pulling out a loaded pistol, pointing it at a person, or fumbling with the trigger) from which a jury might infer that he intended to discharge it, he may be convicted under 24 & 25 Vict. c. 100, s. 14, if his intent was to murder, or under sec. 18 if his intent was to do grievous bodily harm. (*oo*)

Sec. 16. 'Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (*p*) to be kept in penal servitude for any term not exceeding ten years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (*pp*)

Sec. 17. 'Whosoever shall *unlawfully and maliciously* prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or *shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid*, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 11. (*q*)

Sec. 18. 'Whosoever shall unlawfully and maliciously *by any means whatsoever* (*qq*) wound or cause (*r*) *any grievous bodily harm* to any person, or shoot at any person, or, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable *any person*, or to do some other grievous bodily

(*nn*) *R. v. Lewis*, 9 C. & P. 523.

(*o*) *R. v. St. George*, 9 C. & P. 483.

(*oo*) *R. v. Brown*, 10 Q. B. D. 381. *R. v. Duckworth* (1892), 2 Q. B. 83.

(*p*) The words in brackets have been repealed, but the punishment except as to solitary confinement remains the same. See *ante*, p. 204, note (*g*).

(*pp*) The observations and cases bearing on this clause will be found *post* in the Chapter 'Of Threats and Threatening Letters.'

(*q*) This clause is taken from the 7 Will. 4 and 1 Vict. c. 89, s. 7. The words

'unlawfully and maliciously' are substituted for 'by force' in the former Act. Under the 7 Will. 4 and 1 Vict. c. 89, s. 7, if A. were pulling B. out of the water, and C. prevented A. from doing so, C. would have been guilty of no offence except an assault; the words in *italics* were introduced to meet this and similar cases. C. S. G.

(*qq*) See note (*f*), *ante*, p. 279.

(*r*) An indictment under this section charging the prisoner that he did 'inflict' grievous bodily harm has been held good. *R. v. Bray*, 15 Cox, C. C. 197.

harm to *any* person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable,' as in sec. 11. (*rr*)

Sec. 19. 'Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause.' (*s*)

Sec. 20. 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable [at the discretion of the Court] (*ss*) to be kept in penal servitude [for the term of three years — or to be imprisoned for any term not exceeding two years, with or without hard labour].' (*t*)

Sec. 23. 'Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being

(*rr*) This clause is taken from the 7 Will. 4 and 1 Vict. c. 85, s. 4. The words in *italics* at the beginning of this section were introduced to make it correspond with sec. 11, *ante*, p. 279. As to the word 'wound' see the note to that section. The word 'any' is substituted in two places for 'such,' in order to provide for cases where the prisoner wounds, &c., A., when he intends to wound B., and the like.

(*s*) This clause is new, and is introduced to meet every case where a prisoner attempts to discharge a gun, &c., loaded in the barrel, but which misses fire for want of priming, or of a copper cap, or from any like cause.

(*ss*) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (*g*).

(*t*) This clause is taken from the 14 & 15 Vict. c. 19, s. 4; and see the 10 Geo. 4, c. 34, s. 29 (1). The word 'wound' has been so placed in this clause that the words 'either with or without any weapon or instrument,' may apply to it. Under the 20th section of the 24 & 25 Vict. c. 100, it is a misdemeanor to unlawfully and maliciously wound any person. By 14 & 15 Vict. c. 19, s. 5, upon the trial of any indictment for felony, where the indictment shall allege that the prisoner wounded any person, if the jury are satisfied that the defendant is guilty of wounding, but are not satisfied that the defendant is guilty of the felony charged, the jury may acquit him of the felony and find him guilty of unlawful wounding, and he may thereupon be punished as if he had been convicted of the misdemeanor of unlawful wounding. The prisoner was indicted for unlawfully and maliciously wounding, with intent to do grievous bodily harm. The prosecutor was

using a punt in a creek of a river for the purpose of shooting wild fowl, lying with his face downwards in the punt, and paddling it with his arms over the sides. When slewing the punt round to return home, he suddenly heard the report of a gun, and found himself shot and wounded seriously. The prisoner had fired the shot in the direction of the punt with the intention of frightening the prosecutor from again coming into the creek for the purpose of fowling, and not with the intention of doing him grievous bodily harm. The prisoner at the time and afterwards asserted that if the prosecutor had not slewed the punt round at the moment of his shooting, the shot would not have struck him. The jury found the prisoner guilty of unlawful wounding, under 14 & 15 Vict. c. 19, s. 5. Held, that the 5th section of the 14 & 15 Vict. c. 19, must be construed as if the word malicious were applied to wounding; and that there was evidence on the above facts of a malicious wounding by the prisoner, and the conviction was right. *R. v. Ward*, 41 L. J. M. C. 69. L. R. 1 C. C. R. 356. The prisoner, with the intention of causing terror in the minds of persons leaving a theatre, put out the gaslights on the staircase, and also, with the intention of obstructing the exit, placed an iron bar across the doorway. A panic ensued, and the audience rushed down the staircase against the iron bar. Several of them were injured. The prisoner was indicted under 24 & 25 Vict. c. 100, s. 20, and it was held that he could be rightly convicted of unlawfully and maliciously inflicting grievous bodily harm upon two of the audience named in the indictment. *R. v. Martin*, 8 Q. B. D. 54.



convicted thereof shall be liable [at the discretion of the Court] (*tt*) to be kept in penal servitude for any term not exceeding ten years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour].’ (*u*)

Sec. 24. ‘Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable,’ as in sec. 20. (*v*)

Sec. 25. ‘If upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor.’

Mr. Starkie, in his excellent work on evidence, (*w*) makes the following observations: ‘Upon an indictment for shooting or cutting another, with intent to murder or maim him, or to do him some grievous bodily harm, whether the act was done by the prisoner, with the particular intention wherewith it is charged to have been done, is, as in other cases of specific malice and intention, a question for the jury. Their inference upon this important point, as in other cases of malicious intention, must be founded upon a consideration of the situation of the parties, the conduct and declarations of the prisoner, and, above all, on the nature and extent of the violence and injurious means he has employed to effect his object. In estimating the prisoner’s real intention, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule, that a man’s motives and intentions are to be inferred from the means which he uses and the acts which he does. If, with a deadly weapon, he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results, that his mind and intention were to destroy. It is not, however, essential to the drawing of such an inference, that the wound should have been inflicted on a part where it was likely to prove

(*tt*) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (*g*).

(*u*) This clause is taken from the 23 & 24 Vict. c. 8, s. 1.

(*v*) This clause is taken from the 23 & 24 Vict. c. 8, s. 2. Upon an indictment on the 23 & 24 Vict. c. 8, s. 2, for administering cantharides to a female, with intent to injure, aggrieve, and annoy her, it appeared that the prisoner, unknown to the prosecutrix, put cantharides into a cup of tea which she drank, and was very ill in consequence, and the jury found that the prisoner administered the cantharides with intent to excite the sexual passion and desire

of the prosecutrix, in order that he might obtain connection with her, and on a case reserved, after a verdict of guilty, on the question whether the intent above stated was an intent to injure, aggrieve, or annoy within the statute, the conviction was affirmed. *R. v. Wilkins*, 1 L. & C. 89. But where cantharides was administered in such a small quantity as to be incapable of doing any mischief, although administered with the intent to cause inconvenience and annoyance, Cockburn, C. J., after consulting Hawkins, J., held that this was no ‘administering of a noxious thing’ within the section. *R. v. Hennah*, 13 Cox, C. C. 547.

(*w*) 2 Vol 691 *et seq.*

mortal; such a circumstance is merely a simple and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it could not have proved mortal, provided the criminal intention can be clearly inferred from other circumstances.' (x)

The cutting must be expressly laid with the intent stated in the Act: as it has been holden that an indictment for cutting with intent to do some grievous bodily harm, without saying, 'in so doing,' or, 'by means thereof,' was not sufficient. (y)

**Principals aiding, etc.**<sup>1</sup> — If several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act. (z)

But where a party is present, aiding, &c., it is not necessary that his should be the hand by which the mischief is inflicted. (a)

It was suggested, that where an ineffectual exchange of shots took place in a deliberate duel, both the parties might have been guilty of the offence of maliciously shooting within the 43 Geo. 3, c. 58. (b)

By the 14 & 15 Vict. c. 19, s. 5, 'If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully (c) cutting, stabbing, or wounding, and thereupon the defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding.'

And upon an indictment for any offence mentioned in this chapter, the jury, under the 14 & 15 Vict. c. 100, s. 9, may convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted on an indictment for such attempt.

Some decisions on repealed statutes will be found in the Appendix at the end of this volume.

(x) *R. v. Case*, York. Sum. Ass. 1820. 2 Stark. Ev. 692, note (A), *cor.* Park, J., who said that it had been so held by the judges. It is obvious that a case may fall both within the letter and the spirit of the statute, although from accident or from ignorance the prisoner has not succeeded in reaching a vital part. — Note by Mr. Starkie.

(y) *Anon. cor.* Dallas, C. J., and Burton, J., at Chester, 5 Evans' Col. Stat. Pt. v. Cl. iv. p. 334, note (3).

(z) *R. v. White*, MSS. Bayley, J., and R. & R. 99.

(a) *R. v. Towle*, R. & R. 314. S. C. 2 Marsh. 466. And see vol. i. p. 162.

(b) 3 Chit. Crim. L. 848, note (w). It seems that the shooting or attempting to shoot in all cases of duels is now punishable under 24 & 25 Vict. c. 100, s. 18, *ante*, p. 281. See *R. v. Douglas*, C. & M. 193.

(c) See *R. v. Ward*, *ante*, p. 282. The section only applies where the indictment alleges a felonious cutting, stabbing, or wounding, and therefore where the indictment charged a felonious shooting with intent, it was held that the section did not apply. *R. v. Miller*, 14 Cox, C. C. 356.

#### AMERICAN NOTE.

<sup>1</sup> It seems to have been held in some American cases, see Bishop, i. s. 365, that where two persons join in an assault and one commits mayhem, the other is not guilty of

mayhem unless he also intended to commit it; but the learned author disapproves of this statement of the law.

SEC. III.

*Of attempting to Choke, and using Drugs in order to commit Offences.*

By the 24 & 25 Vict. c. 100, s. 21, 'Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (e) to be kept in penal servitude for life, [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour].'

The 26 & 27 Vict. c. 44 recites the 24 & 25 Vict. c. 96, s. 43, and the preceding clause, and enacts, that 'Where any person is convicted of a crime under either of the said sections, the Court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice, or thrice privately whipped, subject to the following provisions :

- '1. That in the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod :
- '2. That in the case of any other male offender the number of strokes do not exceed fifty at each such whipping :
- '3. That in each case the Court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used :  
Provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence ; provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison with a view of his undergoing his sentence of penal servitude.'

By the 24 & 25 Vict. c. 100, s. 22, 'Whosoever shall unlawfully apply or administer to *or cause to be taken by*, or attempt to apply or administer to *or attempt to cause to be administered to or taken by* any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any *indictable offence*, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (e) to be kept in penal servitude for life [or for any other term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour].' (f)

(e) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (g).

(f) This clause is taken from the 14 & 15 Vict. c. 19, s. 3. The words in *italics* in the beginning of this clause were introduced for

## SEC. IV.

*Of Ill-treating Apprentices and Servants, and of Cruelty to Children, Lunatics, and others.*

By the 24 & 25 Vict. c. 100, s. 26, 'Whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously *do or cause to be done any bodily harm* to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable [at the discretion of the Court] to be kept in penal servitude [for the term of three years — or to be imprisoned for any term not exceeding two years, with or without hard labour].' (g)

As to guardians and overseers being required to prosecute in certain cases under this Act, see sec. 73, noticed Vol. I. p. 93.

Sec. 27. 'Whosoever shall unlawfully abandon or expose (h) any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable,' as in sec. 26. (i)

The prisoners were convicted on an indictment which charged that they did abandon and expose a child, under the age of two years, whereby the life of the child was endangered. The indictment was framed on the 24 & 25 Vict. c. 100, s. 27. One of the prisoners was the mother of the child, which was illegitimate, and both the prisoners put the child in a hamper at S., wrapped up in a shawl, and packed with shavings and cotton-wool, and the mother took the hamper to the booking-office of the railway station at M., and left it, having paid the carriage of it to G. The hamper was addressed to the lodgings of the father of the child at G. She told the clerk at the office to be very careful of it, and to send it by the next train, which was due in ten minutes from that time. Upon the address were the words written, 'With care; to be delivered immediately.' The hamper was carried by the passenger train, and was delivered at its address in a little less than an hour from leaving M. On its being opened the child was found alive. The child was taken by the relieving officer the same evening to the union workhouse, where it lived for three weeks afterwards, when it died from causes not attributa-

the same reason as those in sec. 14. See the note to that section, *ante*, p. 280.

(g) This clause is taken from the 14 & 15 Vict. c. 11, s. 1. The words in *italics* are substituted for the word 'assault.' The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (g).

(h) As to exposure, amounting to an assault, see *post*, p. 307.

(i) This clause is new. It is intended to provide for cases where children are aban-

doned or exposed under such circumstances that their lives or health may be, or be likely to be, endangered. See *post*, p. 295. *R. v. Hogan*, 2 Den. C. C. R. 277; *R. v. Cooper*, 1 Den. C. C. 459, 2 C. & K. 876; *R. v. Philpot*, 1 Dears. C. C. 179; *R. v. Gray*, 1 Dears. and B. 303, which shows the necessity for this enactment. The provisions of 57 & 58 Vict. c. 41 (see *post*) as to presumption of age, evidence, &c., apply to proceedings under this section.

ble to the conduct of the prisoners, or either of them. It was proved to have been a delicate child: — Held, by a majority of the judges, that the conviction was right. (*j*)

The prisoner was the father of a child under two years of age. The child was in the custody of the mother, who was living apart from the prisoner. The mother brought the child to him and left it outside the door of his house at about seven o'clock P. M. He was inside, and she called out 'Bill, here's your child, I can't keep it; I am gone.' She left, and the prisoner afterwards came out of the house, stepped over the child, and went away. An hour and a half afterwards the child was still lying in the road outside the wicket of the garden; it was dressed in short clothes, and had nothing on its head. The prisoner's attention was called to the child when he came home, after a further interval of an hour and a half. He said that he should not touch it, and that those that brought it there must come and take it. The child was found at one A. M. lying in the road cold and stiff: — Held, that the prisoner was rightly convicted of having abandoned and exposed the child, within the meaning of the 24 & 25 Vict. c. 100, s. 27. (*k*)

By the Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, s. 1, (1) 'If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor; and

'(a) On conviction on indictment, shall be liable, at the discretion of the Court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

'(b) On summary conviction shall be liable, at the discretion of the Court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months.

'(2) A person may be convicted of an offence under this section either on indictment or by a Court of summary jurisdiction notwithstanding the death of the child in respect of whom the offence is committed.

'(3) If it is proved that a person indicted under this section was interested in any sum of money accruable or payable in the event of the death of the child, and had knowledge that such sum of money was accruing or becoming payable, the Court, in its discretion, may

'(a) Increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or

'(b) In lieu of awarding any other penalty under this section,

(*j*) *R. v. Falkingham*, 39 L. J. M. C. 47.      (*k*) *R. v. White*, 40 L. J. M. C. 134.

sentence the person indicted to penal servitude for any term not exceeding five years.

‘(4) A person shall be deemed to be interested in a sum of money under this section if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable.

‘(5) An offence under this section is in this Act referred to as an offence of cruelty.’

Sec. 2 provides for the summary conviction of persons causing or procuring children to beg, sing, or perform in the streets or on licensed premises under certain conditions, and sec. 3 gives power to justices to grant licences, subject to certain restrictions for the employment or training of children in places of public entertainment.

By sec. 4, (1) ‘Any constable may take into custody, without warrant, any person—

‘(a) Who within view of such constable commits an offence under this Act, or any of the offences mentioned in the Schedule to this Act, (1) where the name and residence of such person are unknown to such constable and cannot be ascertained by such constable; or

‘(b) Who has committed or who he has reason to believe has committed any offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, (1) if he has reasonable ground for believing that such person will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the constable.

‘(2) Where a constable arrests any person without warrant in pursuance of this section, the inspector or constable in charge of the station to which such person is conveyed shall, unless in his belief the release of such person on bail would tend to defeat the ends of justice, or to cause injury or danger to the child against whom the offence is alleged to have been committed, release the person arrested on his entering into such a recognisance, with or without sureties, as may in his judgment be required to secure the attendance of such person upon the hearing of the charge.’

By sec. 5, (1) ‘A constable may take to a place of safety any child in respect of whom an offence under paragraph (a) of section two of this Act has been committed, or in respect of whom an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, (1) has been, or there is reason to believe has been, committed.

‘(2) A child so taken to a place of safety, and also any child under the age of sixteen years who seeks refuge in a place of safety, may there be detained until it can be brought before a Court of summary jurisdiction, and that Court may make such order as is mentioned in the next following sub-section, or may cause the child to be dealt with as circumstances may admit and require until the charge made against any person in respect of any offence as aforesaid

(1) Any offence under secs. 27, 55, or 56 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, and any offence against a child under the age of sixteen years under secs. 43 or 52 of that Act. Any offence under

the Children's Dangerous Performances Act, 1879, 42 & 43 Vict. c. 34. Any other offence involving bodily injury to a child under the age of sixteen years.

with regard to the child has been determined by the committal for trial, or conviction, or discharge of such person.

‘(3) Where it appears to a Court of summary jurisdiction or any justice that an offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act (*n*) has been committed in the case of any child that is brought before such Court or justice, and that the health or safety of the child will be endangered unless an order is made under this sub-section, the Court or justice may, without prejudice to any other power under this Act, make such order as circumstances require for the care and detention of the child until a reasonable time has elapsed for a charge to be made against some person for having committed the offence, and, if a charge is made against any person within that time, until the charge has been determined by the committal for trial or conviction or discharge of that person, and any such order may be carried out notwithstanding that any person claims the custody of the child.

‘(4) Boards of guardians shall provide for the reception of children brought to a workhouse in pursuance of this Act, and where the place of safety to which a constable takes a child is a workhouse, the master shall receive the child into the workhouse if there is suitable accommodation therein for the same, and shall detain the child until the case is determined, and any expenses incurred in respect of the child shall be deemed to be expenses incurred in the relief of the poor.’

By sec. 6, (1) ‘Where a person having the custody, charge, or care of a child under the age of sixteen years has been—

‘(a) Convicted of committing in respect of such child an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act; (*n*) or

‘(b) Committed for trial for any such offence; or

‘(c) Bound over to keep the peace towards such child, by any Court, that Court either at the time when the person is so convicted, committed for trial, or bound over, and without requiring any new proceedings to be instituted for the purpose, or at any other time, and also any petty sessional Court before which any person may bring the case, may, if satisfied on inquiry that it is expedient so to deal with the child, order that the child be taken out of the custody of the person so convicted, committed for trial, or bound over, and be committed to the custody of a relation of the child, or some other fit person named by the Court (such relation or other person being willing to undertake such custody), until it attains the age of sixteen years, or for any shorter period, and may of its own motion or on the application of any person from time to time by order renew, vary, and revoke any such order; but no order shall be made under this section unless a parent of the child has been convicted of or committed for trial for the offence, or is under committal for trial for having been or has been proved to have been party or privy to the offence, or has been bound over to keep the peace towards such child.

‘(2) Every order under this section shall be in writing, and any such order may be made by the Court in the absence of the child;

(*n*) Any offence under secs. 27, 55, or 56 of 24 & 25 Vict. c. 100, and any offence against a child under secs. 43 or 52. Any

offence under 42 & 43 Vict. c. 34. Any other offence involving bodily injury to a child under the age of sixteen years.

and the consent of any person to undertake the custody of a child in pursuance of any such order shall be proved in such manner as the Court may think sufficient to bind him.

‘(8) Where an order is made under this section in respect of a person who has been committed for trial, then if that person is acquitted of the charge, or if the charge is dismissed for want of prosecution, the order shall forthwith be void except with regard to anything that may have been lawfully done under it.

‘(4) A Secretary of State in England may at any time in his discretion discharge a child from the custody of any person to whose custody it is committed in pursuance of this section, either absolutely or on such conditions as such Secretary of State approves, and may, if he thinks fit, make rules in relation to children so committed to the custody of any person, and to the duties of such persons with respect to such children.

‘(5) A Secretary of State, in any case where it appears to him to be for the benefit of a child who has been committed to the custody of any person in pursuance of this section, may empower such person to procure the emigration of the child, but, except with such authority, no person to whose custody a child is so committed shall procure its emigration.’

Sec. 7 provides for the maintenance of any child committed to the custody of any person under the order of the Court.

By sec. 11, ‘Where it appears to the Court by or before which any person is convicted of the offence of cruelty within the meaning of this Act, or of any of the offences mentioned in the schedule to this Act, (o) that that person is a parent of the child in respect of whom the offence was committed, or is living with the parent of the child, and is an habitual drunkard within the meaning of the Inebriates Acts, 1879 and 1888, the Court, in lieu of sentencing such person to imprisonment, may, if it thinks fit, make an order for his detention for any period named in the order not exceeding twelve months in a retreat under the said Acts, the licensee of which is willing to receive him, and the said order shall have the like effect, and copies thereof shall be sent to the local authority and Secretary of State in like manner as if it were an application duly made by such person and duly attested by two justices under the said Acts; and the Court may order an officer of the court or constable to remove such person to the retreat, and on his reception the said Acts shall have effect as if he had been admitted in pursuance of an application so made and attested as aforesaid: Provided that—

‘(a) An order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the Court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and,

‘(b) If the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the Court shall, before making the order, take into consideration any representation made to it by the wife or husband; and

‘(c) Before making the order the Court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be

(o) See *ante*, p. 289, note (n).



made for defraying the expenses of such person during detention in a retreat.'

By sec. 12, 'In any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, (p) such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence.' (q)

By sec. 18, (1) 'Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a Court of any child, in respect of whom an offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act, (p) is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof.

'(2) The justice taking any such deposition shall transmit the same with his statement —

'(a) If the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed; and

'(b) In any other case to the clerk of the peace of the county or borough in which the deposition has been taken; and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the same.'

By sec. 14, 'Where on the trial of any person on indictment for any offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act, (p) the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the 11 & 12 Vict. c. 42, or this Act, shall be admissible in evidence either for or against the accused person without further proof thereof —

'(a) If it purports to be signed by the justice by or before whom it purports to be taken; and

'(b) If it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be

(p) Any offence under secs. 27, 55, or 56 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, and any offence against a child under the age of sixteen years under secs. 43 or 52 of that Act. Any offence under the Children's Dangerous Performances Act, 1879, 42 & 43 Vict. c. 34. Any other offence involving bodily injury to a child under the age of sixteen years.

(q) It has been held in the trial of an indictment against a husband and wife under this Act that if either of them elect to give evidence, the case as against the other

is not over until such evidence has been heard. Per Wills, J., *R. v. Martin*, 17 Cox, 36. It seems doubtful whether this decision could be upheld, as it amounts to saying that whenever one of two or more persons who are jointly indicted can give evidence the case against the other prisoners is not completed on the conclusion of the case for the prosecution, and that such prisoners are not entitled to be discharged, although no case has been made against them by the prosecution, until the evidence of the other prisoner has been heard.

present, an opportunity of cross-examining the child making the deposition.'

By sec. 15, (1) 'Where, in any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, (s) the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the Court understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: and the evidence of such child, though not given on oath but otherwise taken and reduced into writing, in accordance with the provisions of section seventeen of 11 & 12 Vict. c. 42, or of section thirteen of this Act, shall be deemed to be a deposition within the meaning of those sections respectively: (t)

'Provided that—

'(a) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

'(b) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section eleven of 42 & 43 Vict. c. 49, in the case of juvenile offenders.'

By sec. 16, 'Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, (u) the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, and is further satisfied that the evidence of the child is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child.'

By sec. 17, 'Where a person is charged with an offence under this Act, or any of the offences mentioned in the Schedule to this Act, (u) in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the Court to be under that age, such child shall for the purposes of this Act be deemed to be under that age, unless the contrary is proved.'

By sec. 18, (1) 'Where a person is charged with committing an offence under this Act or any of the offences mentioned in the Schedule to this Act in respect of two or more children, the same information or summons may charge the offence in respect of all or any of them, but the person charged shall not be liable to a separate penalty for each child unless upon separate informations.

'(2) The same information or summons may also charge the

(s) This section nullifies the decision in *R. v. Paul*, 25 Q. B. D. 202, and makes the unsworn evidence of a child admissible on a charge of indecent assault.

(t) The last part of this section is inserted to meet the difficulties raised by the decision in *R. v. Prunty*, 16 Cox, C. C. 344.

(u) See *ante*, p. 292, note (p).

offences of assault, ill-treatment, neglect, abandonment, or exposure, together or separately, but when those offences are charged together the person charged shall not be liable to a separate penalty for each.

‘(3) A person shall not be summarily convicted of an offence under this Act, or of an offence mentioned in the Schedule to this Act, (u) unless the offence was wholly or partly committed within six months before the information was laid; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

‘(4) Where an offence under this Act, or any offence mentioned in the Schedule to this Act, (u) charged against any person is a continuous offence, it shall not be necessary to specify in the information, summons, or indictment, the date of the acts constituting the offence.’

By sec. 19, ‘When, in pursuance of this Act, any person is convicted by a Court of summary jurisdiction of an offence, and such person did not plead guilty or admit the truth of the information, or when in the case of any application under sections six, seven, or eight of this Act, other than an application to a judge or Court of assize, any party thereto thinks himself aggrieved by any order or decision of the Court, he may appeal against such a conviction, or order, or decision, in England and Ireland to a Court of quarter sessions, and in Scotland to the High Court of Justiciary, in manner provided by the Summary Prosecutions Appeal (Scotland) Act, 1875, or any Act amending the same.’

By sec. 20, ‘Where a misdemeanor under this Act is tried on indictment, the expenses of the prosecution shall be defrayed in like manner as in the case of a felony.’

By sec. 21, ‘A board of guardians of any parish, or combination, may, out of the funds under their control, pay the reasonable costs and expenses of any proceedings which they have directed to be taken under this Act in regard to the assault, ill-treatment, neglect, abandonment, or exposure of any child, and, in the case of a union, shall charge such costs and expenses to the common fund.’

**Provision as to parents and as to meaning of ‘custody, charge, or care.’** — By sec. 23, (1) ‘The provisions of this Act relating to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression “parent” when used in relation to a child includes guardian and every person who is by law liable to maintain the child.

‘(2) This Act shall apply in the case of a parent who being without means to maintain a child fails to provide for its maintenance under the Acts relating to the relief of the poor, in like manner as if the parent had otherwise neglected the child.

‘(3) For the purposes of this Act —

‘Any person who is the parent of a child shall be presumed to have the custody of the child; and

‘Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

‘Any other person having actual possession or control of a child shall be presumed to have the care of the child.’

**Right of parent, &c., to administer punishment.** — By sec. 24,

(u) See *ante*, p. 292, note (p).

‘Nothing in this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer punishment to such child.’

It is an indictable offence, in the nature of a misdemeanor, to refuse or neglect to provide sufficient food or other necessities for any infant of tender years, unable to provide for and take care of itself (whether such infant be child, apprentice, or servant), whom the party is obliged by duty or contract to provide for; so as thereby to injure its health. (*v*) Where an indictment stated that W., ‘an infant of tender years,’ was placed ‘under the care and control of’ the prisoners as a servant, and that it was their duty to supply her with sufficient food, &c., and also to permit her to have sufficient food, &c., and that they neglected to supply her with sufficient food, &c., and refused to permit her to have sufficient food, &c.; whereby her health was injured. W. was between fourteen and seventeen years of age during the time of the ill-treatment alleged, and it did not appear that she was prevented from going out and complaining of the treatment she received. It was held, first, that W. was not an infant of tender years. A person of tender years is a person incapable of acting or judging for himself. And children of much earlier age may contract marriage and other relations, and are competent in law to act for themselves. Secondly, that the terms ‘under the care and control’ of the prisoners meant under such control as to be prevented from acting for herself, and that this girl was a free agent; and, therefore, the indictment was not proved. (*w*)

In these cases it must be both alleged and proved that the health was injured. The indictment alleged that the prisoner was the mother, and had the care of an infant female child unable to support itself, and that it was the duty of the prisoner to support the child, but that the prisoner unlawfully neglected to support it, and unlawfully abandoned it without necessary food for a long space of time, whereby the child was greatly injured and weakened. The prisoner was the wife of a seaman, and received a portion of his pay, and was able to work and get her living if she chose; she left the child without food from Monday evening till Thursday morning, and but for the attention of a poor neighbour, the child must have suffered most severely, and might probably have died for want of food, and though it did suffer in some degree from want of food, it was not to any serious extent; and it was held that the conduct of the prisoner in absenting herself, irrespective of any actual injury to the child, was not a misdemeanor at common law, and therefore it was necessary to prove the averment that the child was greatly injured and

(*v*) *R. v. Friend and his Wife*, MS. Bayley, J., and *R. & R. 20*. Chambre, J., differed, thinking it not an indictable offence, but a matter founded wholly on contract, in this which was the case of an apprentice. The indictment should state that the infant was of tender years, and not able to provide for itself. And see *R. v. Ridley*, 2 Campb. 650. *R. v. Squire and other cases*, ante, p. 13. As to the neglect of paupers by overseers of the poor, see vol. i. p. 419.

(*w*) Anonymous, 5 Cox, C. C. 271. Coleridge and Cresswell, JJ. ‘If being of ordinary or even superior intellect and capacity, she was so under the control of the defendants, so impressed with fear either from being watched or being threatened, as to be unable to resort to the assistance of her natural defenders or of other persons, then a duty would devolve on the defendants greater than that arising from the civil contract.’ Per Cresswell, J. See *R. v. Smith*, L. & C. 607; 34 L. J. M. C. 153.

weakened ; and that the evidence that the child had suffered to some but not to any serious extent was not sufficient, as it did not shew any injury to the health. (x)

It has been laid down that it is the bounden duty of all persons having children of tender age, when they themselves cannot support them, to endeavour to obtain the means of getting them support ; and if they wilfully abstain for several days from going to the union where they have by law a right to support, they are criminally responsible for the consequences. (y)

An indictment alleged that the prisoner was a single woman and the mother of a child of very tender age and unable to provide for itself, and that it was the duty of the prisoner to provide food for the child, she 'being able and having the means to perform her said duty,' and that she unlawfully neglected to provide sufficient food for the child, whereby its life was endangered. There was no evidence that the prisoner actually had the means of supporting the child ; but it was proved that she could have applied to the relieving officer of the union, and, had she done so, she would have been entitled to and would have received relief for herself and the child adequate to their due support and maintenance, and that she had not made any such application ; and it was held that there was no evidence that the prisoner had the means of maintaining the child, and therefore that allegation in the indictment was not proved. (z)

In the first count of an indictment the prisoner was charged with neglecting to provide sufficient food for her infant child, 'she being able and having the means to perform her duty' in that respect. The jury found her guilty on the ground that 'if she had applied to the guardians for relief she would have had it,' and the Court held, on the authority of *R. v. Chandler*, (a) that the finding of the jury was not sufficient to maintain the count. A second count charged the neglect to provide food, but omitted the allegation that she had means to do so, and it was doubted if the count was good in law ; (b) et per Bovill, C. J., 'We have to consider the effect of the verdict of the petit jury on the first two counts. They found a verdict of guilty, but added, "we do so on the ground that if she had applied" (to the guardians) "for relief, she would have had it." The case of *R. v. Chandler* shews that that finding was not sufficient to maintain the first count of the indictment, which contains the allegation of ability and means on the part of the prisoner. On the second count of the indictment, assuming that count to be good, which we doubt, the allegation is, that the prisoner unlawfully and wilfully did neglect and refuse to find and provide her child with necessary food, &c.; but there is no allegation that the prisoner had the means of procuring, or could have procured it, and wilfully abstained from doing so. The allegation in that count is not found by the jury. On these grounds we are of opinion that the conviction should be quashed.'

(x) *R. v. Philpot*, Dears. C. C. R. 179. See *R. v. Cooper*, 1 Den. C. C. 459 ; and *R. v. Hogan*, 2 Den. C. C. 277 ; and see now the 24 & 25 Vict. c. 100, s. 27, *ante*, p. 286.

(y) Per Erle, J., and Martin, B. *R. v.*

*Mabbet*, 5 Cox, C. C. 339, *ante*, p. 19, but see *infra*.

(z) *R. v. Chandler*, Dears. C. C. R. 453.

(a) *Supra*.

(b) *R. v. Rugg*, 12 Cox, C. C. 16. See *R. v. Ryland*, *infra*. *R. v. Shepherd*, *ante*, p. 20.

An indictment for neglecting to provide sufficient food and sustenance for a child of tender years, whereby the child became ill and enfeebled, averred that it was the duty of the prisoner to provide for, give, and administer to the said child wholesome and sufficient meat, drink, and clothing for the sustenance, &c., of the said child, and that he unlawfully, and contrary to his said duty in that behalf, did omit, neglect, and refuse to provide for, &c., the child:—Held, by the majority of the Court, that the indictment sufficiently alleged the breach of duty, and that the prisoner had the ability to provide but omitted to exercise it. (*c*)

It has been held that a parent who wilfully withholds necessary food from his child, with the wilful determination by such withholding to cause the death of the child, is guilty of murder, if the child dies, and if he does so negligently but not wilfully, and the child dies in consequence of the neglect, he is guilty of manslaughter. (*d*)

**Lunatics.**—It has been held that it is not an indictable offence for a brother to neglect to maintain another brother, even if he be an idiot, helpless, and an inmate of his house. (*e*)

Where a count charged that B. S. was the illegitimate son of the prisoner, and that B. S. for a long space of time was of unsound intellect and incapable of taking care of himself, and during all that time had resided with the prisoner, who had sufficient means for the maintenance of herself and B. S.; whereupon it became the duty of the prisoner to take due and proper care of B. S., nevertheless the prisoner did not nor would take due and proper care of B. S., but on the contrary thereof during that time maliciously and unlawfully kept and confined B. S. in a dark, cold, and unwholesome room, and neglected to provide B. S. with proper clothing, and suffered the body of B. S. to be foul, &c., and divers large quantities of filth to collect in the said room and to cause noxious and unwholesome smells, and kept B. S. without sufficient and proper air, warmth, and exercise necessary for the health of B. S. The Court of Queen's Bench arrested the judgment, observing that 'there was no averment that the lunatic was under the control of the prisoner, nor any alleged duty in her to take care of him shewn. Again, even if such duty had been shewn, acts of commission and omission were charged very likely to produce injury, but it was not alleged that injury was actually produced; and it is by no means a necessary consequence of such acts, nor was it alleged to have been the actual consequence of them, nor even to have continued so long that injury must, or probably would result. There was therefore nothing at most beyond a probable conjecture that the patient's suffering was at all connected with his mother's misconduct.' (*f*)

So where a count charged that the prisoner intending to injure B. S., being a person of unsound intellect and incapable of taking care of himself, whilst B. S. was under the care, custody, and control of the prisoner, maliciously and unlawfully kept, confined and

(*c*) *R. v. Ryland*, 37 L. J. M. C. 10, L. R. 1 C. C. R. 99.

(*d*) *R. v. Coude*, 10 Cox, C. C. 547.

(*e*) *R. v. Smith*, 2 C. & P. 449, Burrough, J. See *R. v. Marriott*, 8 C. & P. 425.

*Patteson, J. R. v. Instan* (1893), 1 Q. B. 450, and see 53 Vict. c. 5, s. 322, *post*, p. 299.

(*f*) *R. v. Pelham*, 8 Q. B. 959.

imprisoned, B. S., &c.; the Court of Queen's Bench arrested the judgment for want of a positive averment that B. S. was under the care and control of the prisoner at the time she committed the acts alleged in the indictment. 'They were all said to have been done *whilst* the unfortunate lunatic was under her care and control; but there was no averment that he ever was so.' (g)

The Criminal Lunatic Asylum Act, 23 & 24 Vict. c. 75, s. 13, enacts, that 'any superintendent, officer, nurse, attendant, servant, or other person employed in any asylum for criminal lunatics, who strikes, wounds, ill-treats, or wilfully neglects any person confined therein, shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, and, on conviction under the indictment, to fine or imprisonment, with or without hard labour, or to both fine and imprisonment at the discretion of the Court, or to forfeit for every such offence, on summary conviction thereof before two justices, any sum not exceeding twenty pounds nor less than two pounds.'

The 53 Vict. c. 5, contains regulations for the care and treatment of lunatics, and for the licensing of houses for the reception of lunatics. (h)

By sec. 8, provision is made for the right of a lunatic received as a private patient to be examined by a judicial authority, and for notice being given of his reception, and by sub-sec. 5, 'If any manager of an institution for lunatics, or any person having charge of a single patient, omits to perform any duty imposed upon him by this section he shall be guilty of a misdemeanor.'

By sec. 214, 'If any person, for the purpose of obtaining a licence, or the renewal of a licence, for a house for the reception of lunatics, wilfully supplies to the commissioners or justices any untrue or incorrect information, plan, description, statement or notice, he shall be guilty of a misdemeanor.'

By sec. 222, 'If after the lapse of two months from the expiration or revocation of the licence of any house there are in the house two or more lunatics, every person keeping the house, or having the care or charge of lunatics therein, shall be guilty of a misdemeanor.'

By sec. 237 (4), 'If any lunatics are detained or kept in a hospital after the date appointed by the order for closing the hospital, the superintendent of the hospital shall be guilty of a misdemeanor.'

By sec. 200, 'If the person having charge of a single patient refuses to shew to any commissioner, at his request, any part of the

(g) *R. v. Pelham, supra.* In *Urmston v. Newcoman*, 4 A. & E. 899, in answer to a remark by counsel, that, 'by the common law if a child perish for want of proper care, it is murder in the party neglecting it,' Lord Denman, C. J., said, 'if the person has the actual custody,' and Patteson, J., added, 'or the child be part of his family.' And as a person incapable of taking care of himself through imbecility of mind, is in contemplation of law in the same situation as an infant (*R. v. Much Cowarne*, 2 B. & Ad. 861), it should seem that if a person, who is the parent, or has the actual custody

of a lunatic, neglects to provide for such lunatic, though more than twenty-one years of age, whereby his health is injured, such person would be indictable in the same manner as if the lunatic were a child of such tender years as to be unable to provide for and take care of itself. See *R. v. Friend, supra.* C. S. G.

(h) As to who is a lunatic, see *R. v. Shaw*, 37 L. J. M. C. 112. And as to what evidence is required to shew that the prisoner has not fulfilled the required conditions as to obtaining certificates, see *R. v. Harris*, 10 Cox, 451, *post*, *Evidence*.

house wherein the single patient resides, or any part of the grounds belonging thereto, he shall be guilty of a misdemeanor.' A similar provision as to hospitals and licensed houses is contained in sec. 195.

By sec. 40, 'Mechanical means of bodily restraint are forbidden unless the restraint is necessary for the purposes of surgical or medical treatment, or to prevent the lunatic from injuring himself or others, in which case a certificate of the grounds for using such restraint shall be given, and a record of it shall be kept and transmitted to the commissioners quarterly.

'Any person who wilfully acts in contravention of this section shall be guilty of a misdemeanor.'

By sec. 75, 'Any person detaining a patient after being served with an order for his discharge shall be guilty of a misdemeanor.'

By sec. 233, 'If the superintendent of a registered hospital knowingly permits any lunatic to be detained or lodged in any building not shewn on the plans of the hospital sent to the commissioners, he shall be deemed guilty of a misdemeanor.'

By sec. 315, '1st. Every person who, except under the provisions of this Act, receives or detain a lunatic, or alleged lunatic, in an institution for lunatics, or for payment takes charge of, receives to board or lodge, or detains a lunatic or alleged lunatic in an unlicensed house, shall be guilty of a misdemeanor, and in the latter case shall also be liable to a penalty not exceeding fifty pounds.

'2nd. Except under the provisions of this Act, it shall not be lawful for any person to receive or detain two or more lunatics in any house unless the house is an institution for lunatics or workhouse.

'3rd. Any person who receives or detains two or more lunatics in any house, except as aforesaid, shall be guilty of a misdemeanor.' (i)

By sec. 316. 'The manager of any hospital or licensed house, and any person having charge of a single patient who omits to send to the commissioners the prescribed documents and information upon the admission of a patient, or to make the prescribed entries, and give the prescribed notices upon the removal, discharge, or death of a patient, shall be guilty of a misdemeanor, and in the case of a single patient shall also be liable to a penalty not exceeding fifty pounds.'

By sec. 317, '1st. Any person who makes a wilful misstatement of any material fact in any petition, statement of particulars, or reception order under this Act, shall be guilty of a misdemeanor.

'2nd. Any person who makes a wilful misstatement of any material fact in any medical or other certificate, or in any statement or report of bodily or mental condition under this Act, shall be guilty of a misdemeanor.

'3rd. A prosecution for a misdemeanor under this section shall not take place except by order of the Commissioners, or by direction of the Attorney-General or the Director of Public Prosecutions.'

By sec. 318, 'Any person who in any book, statement, or return knowingly makes any false entry as to any matter as to which he is

(i) It appears to be immaterial that the person so receiving the lunatics honestly and reasonably believed that they were not lunatics. *R. v. Bishop*, 5 Q. B. D. 259.



by this Act or any rules made under this Act required to make any entry shall be guilty of a misdemeanor.'

By sec. 319, 'If the manager of an institution for lunatics, or the person having charge of a single patient, omits to send to the coroner notice of the death of a lunatic within the prescribed time, he shall be guilty of a misdemeanor.'

By sec. 321, '1st. Any person who obstructs any Commissioner of Chancery or other visitor in the exercise of the powers conferred by this or any Act, shall for each offence be liable to a penalty not exceeding fifty pounds, and shall also be guilty of a misdemeanor.

'2nd. Any person who wilfully obstructs any other person authorised under this Act by an order in writing, under the hand of the Lord Chancellor, or a Secretary of State, to visit and examine any lunatic or supposed lunatic, or to inspect or inquire into the state of any institution for lunatics, gaol, or place wherein any lunatic or person represented to be lunatic is confined or alleged to be confined, in the execution of such order, and any person who wilfully obstructs any person authorised under this Act by any order of the commissioners to make any visit and examination or inquiry in the execution of such order, shall (without prejudice to any proceedings, and in addition to any punishment, to which such person obstructing the execution of such order would otherwise be subject) be liable for every such offence to a penalty not exceeding twenty pounds.'

By sec. 322, 'If any manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics, or any person having charge of a lunatic, whether by reason of any contract, or of any tie of relationship, or marriage, or otherwise (j) ill-treats or wilfully neglects a patient, he shall be guilty of a misdemeanor, and, on conviction on indictment, shall be liable to fine or imprisonment, or to both fine and imprisonment at the discretion of the Court, or be liable on summary conviction for every offence to a penalty not exceeding twenty pounds, nor less than two pounds.'

By sec. 323, 'If any manager, officer, or servant of an institution for lunatics wilfully permits, or assists or connives at the escape, or attempted escape of a patient, or secretes a patient, he shall for every offence be liable to a penalty not exceeding twenty pounds nor less than two pounds.'

By sec. 324, 'If any manager, officer, nurse, attendant, or other person employed in any institution for lunatics (including an asylum for criminal lunatics) or workhouse, or any person having the care or charge of any single patient, or any attendant of any single patient, carnally knows or attempts to have carnal knowledge of any female under care or treatment as a lunatic in the institution or workhouse, or as a single patient, he shall be guilty of a misdemeanor, and, on conviction on indictment, shall be liable to be imprisoned, with or without hard labour, for any term not exceeding two years; and no consent, or alleged consent, of such female thereto, shall be any defence to an indictment or prosecution for such offence.'

By sec. 325, '1st. Except as by this Act otherwise provided, proceedings against any person for offences against this Act may be taken —

(j) These words appear to have been inserted on account of the decision in *Buchanan v. Hardy*, 18 Q. B. D. 486.

‘(a) By the secretary of the Commissioners upon their order for any offence.

‘(b) By the clerk of the visitors of any licensed house for an offence committed within their jurisdiction.

‘(c) By the clerk of the visiting committee of an asylum for any offence by any person employed therein; and such proceedings shall not abate by the death or removal of the prosecuting secretary or clerk, but the same may be continued by his successor, and in any such proceedings the prosecuting secretary or clerk, shall be competent to be a witness.

‘2nd. Except as by this Act otherwise provided, it shall not be lawful to take such proceedings, except by order of the Commissioners, or of visitors having jurisdiction in the place where the offence was committed, or with the consent of the Attorney-General or Solicitor-General.’

By sec. 328, ‘A Secretary of State on the report of the Commissioners or visitors of any institution for lunatics may direct the Attorney-General to prosecute on the part of the Crown any person alleged to have committed a misdemeanor under this Act.’

By sec. 329, ‘Where any person is proceeded against under this Act, on a charge of omitting to transmit or send any copy, list, notice, statement, report, or other document required to be transmitted or sent by such person, the burden of proof that the same was transmitted or sent within the time required shall lie upon such person: but if he proves by the testimony of one witness upon oath that the copy, list, notice, statement, report, or document in respect of which the proceeding is taken, was properly addressed and put into the post in due time or (in case of documents required to be sent to the Commissioners, or a clerk of the peace, or a clerk to guardians) left at the office of the Commissioners, or of the clerk of the peace, or clerk to the guardians, such proof shall be a bar to all further proceedings in respect of such charge.

‘(2) In proceedings under this Act where a question arises whether a house is or is not a licensed house or registered as a hospital, it shall be presumed not to be so licensed or registered unless the licence or certificate of registration is produced, or sufficient evidence is given that a license or certificate is in force.’

## SEC. V.

### *Of Offences against the Person committed with Gunpowder, &c. (k)*

By the 24 & 25 Vict. c. 100, s. 28, ‘Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted

(k) As to damaging buildings by gunpowder, see secs. 9 & 10 of the 24 & 25 Vict. c. 97, vol. ii. c. 44.

thereof shall be liable [at the discretion of the Court] (*l*) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and if a male under the age of sixteen years, with or without whipping.' (*m*)

Sec. 29. 'Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable,' as in sec. 28. (*n*)

Sec. 30. 'Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel, any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof, shall be liable [at the discretion of the Court] (*l*) to be kept in penal servitude for any term not exceeding fourteen years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and if a male under the age of sixteen years, with or without whipping.' (*o*)

Sec. 64. 'Whosoever shall knowingly have in his possession, or make or manufacture any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, [and with or without solitary confinement,] (*p*) and, if a male under the age of sixteen years, with or without whipping.' (*q*)

Sec. 65. 'Any justice of the peace of any county or place in which

(*l*) The words in brackets have been repealed, but the punishment except as to solitary confinement remains the same. See *ante*, p. 204, note (*g*).

(*m*) This clause is taken from the 9 & 10 Vict. c. 25, s. 3.

(*n*) Where the prisoner threw an electric fuse detonator out of a railway carriage window, and it was picked up by the prosecutor, and exploded and injured him, it was held that it was a question for the jury as to the intent with which the prisoner had acted. *R. v. Saunders*, 14 Cox, C. C. 180, per Denman, J.

This clause is taken from the 9 & 10 Vict. c. 25, s. 4, and 7 Will. 4 and 1 Vict. c. 85, s. 5. Under those Acts, if any person

had placed an infernal machine in any place where he believed another would tread on it, and thereby cause it to explode, he would not have been guilty of an offence. The words 'put or lay at any place' were introduced to meet all such cases. As to the words 'whether any bodily injury,' &c., see the note to sec. 14, *ante*, p. 280.

(*o*) This clause is taken from the 9 & 10 Vict. c. 25, s. 6.

(*p*) The words in brackets are repealed by the Statute Law Revision Act, 1893 (No. 2), 56 & 57 Vict. c. 54.

(*q*) This clause is taken from the 9 & 10 Vict. c. 25, s. 8, and extended to all the felonies against this Act.

any such gunpowder, or other explosive, dangerous, or noxious substance or thing, or any such machine, engine, instrument, or thing, is suspected to be made, kept, or carried for the purpose of being used in committing any of the felonies in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for searching in the day-time any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, waggon, cart, ship, boat, or vessel, in which the same is suspected to be made, kept, or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining all such gunpowder, explosive, dangerous, or noxious substances, machines, engines, instruments, or things, found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and other receptacles in which the same shall be, the same powers and protections which are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by the Act passed in the Session holden in the 23 & 24 Vict. c. 139.'

See 38 Vict. c. 17, entitled an Act to amend the law with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitro-glycerine, and other explosive substances.

By the 46 Vict. c. 3, s. 2, 'Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life, or to cause serious injury to property, shall, whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for life, or for any less term (not less than three years) or to imprisonment with or without hard labour for a term not exceeding two years.'

By sec. 3, 'Any person who within or (being a subject of Her Majesty) without Her Majesty's dominions unlawfully and maliciously

'(a) Does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion in the United Kingdom of a nature likely to endanger life or to cause serious injury to property, or,

'(b) Makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom, shall, whether any explosion does or does not take place, and whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years, or to imprisonment with or without hard labour for a term not exceeding two years, and the explosive substance shall be forfeited.'

By sec. 4, (1) 'Any person who makes or knowingly has in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or does not have it in his possession or under his control for a lawful object, shall, unless he can shew that he made it, or had it in his possession, or under his control for a lawful object, be guilty

of felony, and on conviction shall be liable to penal servitude for a term not exceeding fourteen years, or to imprisonment for a term not exceeding two years with or without hard labour, and the explosive substance shall be forfeited. (r)

‘(2) In any proceeding against any person for a crime under this section, such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.’

By sec. 5, ‘Any person who within or (being a subject of Her Majesty) without Her Majesty’s dominions by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever procures, counsels, aids, abets, or is accessory to the commission of any crime under this Act, shall be guilty of felony, and shall be liable to be tried and punished for that crime as if he had been guilty as a principal.’

Sec. 6 gives power to the Attorney-General, where he has reason to believe that a crime has been committed under the Act, to authorise any justice of the peace to hold an inquiry. The evidence taken at such inquiry is, however, not to be used against the witness giving such evidence except in case of perjury. Absconding witnesses may be arrested.

By sec. 7, (1) ‘If any person is charged before a justice with any crime under this Act, no further proceeding shall be taken against such person without the consent of the Attorney-General, except such as the justice may think necessary by remand or otherwise to secure the safe custody of such person.

‘(2) In framing an indictment the same criminal act may be charged in different counts as constituting different crimes under this Act, and upon the trial of any such indictment the prosecutor shall not be put to his election as to the count on which he must proceed.

‘(3) For all purposes of and incidental to arrest, trial, and punishment, a crime for which a person is liable to be punished under this Act, when committed out of the United Kingdom, shall be deemed to have been committed in the place in which such person is apprehended or is in custody.

‘(4) This Act shall not exempt any person from any indictment or proceeding for a crime or offence which is punishable at common law or by any Act of Parliament other than this Act; but no person shall be punished twice for the same criminal act.’

Sec. 8 deals with the search for and seizure of explosive substances, and by sec. 9, ‘The expression “explosive substance” shall be deemed to include any materials for making any explosive substance, also any apparatus, machine, implement, or materials used or intended to be used or adapted for causing or aiding in causing any explosion in or with any explosive substance, also any part of any such apparatus, machine, or implement.’

Any part of a vessel which, when filled with an explosive substance, is adapted for causing an explosion, is an explosive substance. (s)

(r) If several persons are connected in a common design to have an explosive substance made for an unlawful purpose, each of the confederacy is responsible in respect

of such articles as are in the possession of others for the carrying out of their common design. *R. v. Charles*, 17 Cox, C. C. 499.

(s) *R. v. Charles*, 17 Cox, C. C. 499.

## CHAPTER THE TENTH.

### OF COMMON AND AGGRAVATED ASSAULTS.

#### SEC I.

##### *Of Common Assaults.*<sup>1</sup>

AN assault is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim. So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault. (a)

But it appears to be now quite settled, though many ancient opinions were to the contrary, that no words whatsoever, be they ever so provoking, can amount to an assault. (b) And the words used at the time may so explain the intention of the party as to qualify his act, and prevent it from being deemed an assault; as where A. laid his hand upon his sword, and said, 'If it were not the assize-time, I would not take such language from you,' it was holden not to be an assault, on the ground that he did not design to do the other party any corporal hurt at that time, and that a man's intention must operate with his act in constituting an assault. (c)

It has been laid down, notwithstanding a contrary opinion in an earlier case, (d) that if a person present a pistol, purporting to be a

(a) 1 Hawk. P. C. c. 62, s. 1. Bac. Abr. tit. 'Assault and Battery' (A). 3 Blac. Com. 120. Burn Just. tit. 'Assault and Battery,' 1. 1 East, P. C. c. 8, s. 1, p. 406. Bull. N. P. 15. Selw. N. P. tit. 'Assault and Battery,' 1.

(b) 1 Hawk. P. C. c. 62, s. 1. Bac. Abr. tit. 'Assault and Battery' (A).<sup>2</sup>

(c) *Turberville v. Savage*, 1 Mod. 3. S. C. 2 Keb. 545.

(d) Anonymous, *cor. Erskine, J.*, mentioned by Ludlow, Serjt., in *R. v. St. George*, 9 C. & P. 492.

#### AMERICAN NOTES.

<sup>1</sup> See *Hays v. P.*, 1 Hill, 321. *Meador v. Stone*, 7 Metc. 151. *S. v. Sims*, 3 Strobh. 137. *S. v. Cherry*, 11 Ired. 475. *S. v. Smith*, 3 Humph. 457. *S. v. Davis*, 1 Ired. 125. It seems to be decided that in order to constitute an assault in America violence must be either offered, menaced, or designed. *P. v. Bransby*, 32 N. Y. 525. In one case

it was held that discharging a gun near to a person who was ill, knowing that the report would make him worse, was an assault. *C. v. Wing*, 9 Pick 1; 19 Am. D. 347.

<sup>2</sup> It would seem that words may make an act into an assault which would not be an assault without such words. *Bishop*, ii. ss. 25, 26, 31, 34.

loaded pistol, so near as to produce danger to life if the pistol had gone off, it is an assault in point of law, although in fact the pistol be unloaded. The learned judge said, 'My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party this is an empty pistol, then that would be no assault, for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent.' (e)

However, where in an action for an assault and presenting a loaded pistol at the plaintiff, it appeared that the defendant cocked a pistol, and presented it at the plaintiff's head, and said if he was not quiet he would blow his brains out; but there was no evidence that the pistol was loaded; Lord Abinger, C. B., held, that if the pistol was not loaded it would be no assault. (f) And Tindal, C. J., has ruled in the same way. (g)

Pointing a loaded gun at half cock at a person is an assault; for there is a present ability of doing the act threatened, as the gun can be cocked in an instant. (h)

It is not every threat, where there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. If, therefore, a party be advancing in a threatening attitude, *e. g.*, with his fist clenched, to strike another, so that his blow would almost immediately have reached such person, and be then stopped, it is an assault in law, if his intent were to strike such person, though he was not near enough at the time to have struck him. (i)

Where the plaintiff was in the defendant's workshop and refused to leave it, and the defendant and his workmen surrounded him, and tucking up their sleeves and aprons, threatened to break his neck, if he did not go out, and fearing that the men would strike him if he did not do so, the plaintiff went out; it was held that this was an

(e) *R. v. St. George*, 9 C. & P. 483. Parke, B.

(f) *Blake v. Barnard*, 9 C. & P. 626. It seems that a very reasonable distinction might be made in cases of this kind. If a person presents a gun at another, knowing it not to be loaded, there can be no intent to injure in any event, and therefore he ought not to be criminally responsible; but if the person, at whom such an unloaded gun was presented, did anything in self-defence, his justification, whether in a civil or criminal proceeding, ought to be just the same as if the gun were loaded; for the act of the party presenting the gun led to the

natural consequence that the party at whom it was presented should defend himself, and the party presenting the gun ought not to be permitted to shew the facts to be otherwise than he had himself held them out to be. C. S. G.

(g) *R. v. James*, 1 C. & K. 530; and see *R. v. Baker*, 1 C. & K. 254, where Rolfe, B., seems also to have held the same opinion.<sup>1</sup>

(h) *Osborn v. Veitch*, 1 F. & F. 317, Willes, J.

(i) *Stephens v. Myers*, 4 C. & P. 349, Tindal, C. J.

#### AMERICAN NOTE.

<sup>1</sup> Mr. Bishop agrees with the doctrine in *R. v. St. George*, rather than with that of *Blake v. Barnard* and *R. v. James*, and it appears to the present editors that he gives very good reasons for his opinion. Bishop,

ii. s. 32. In several of the States, however, an assault has been defined by statute to be "an unlawful attempt, coupled with a present ability."

assault; for there was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution. (*j*)

The plaintiff was walking on a footpath by a road side, and the defendant, who was on horseback, rode after him at a quick pace; the plaintiff then ran away into his own garden, and the defendant rode up to the gate, and shook his whip at the plaintiff, who was about three yards off; it was held, that if the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter to avoid being beaten, it was an assault. (*k*)

A *battery* is more than an *attempt* to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law. (*l*) For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. (*m*) It should be observed that every battery includes an assault. (*n*)

To cut a man's clothes whilst on his person is an assault, although there is no intention to inflict any bodily injury, and in the ordinary case of a blow on the back there is clearly an assault, though the blow is received by the coat on the person. (*o*)

Where a policeman was stationed at a door to prevent a person from entering, it was held that, if he was entirely passive, like a door or a wall put to prevent that person from entering the room, and simply obstructing the entrance of that person, no assault was committed. (*p*)

The injury need not be effected directly by the hand of the party.<sup>1</sup> Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c., against the carriage of another person, and thereby causing bodily injury to the persons travelling in it. (*q*) And it seems that it is not necessary that the assault should be immediate; as where a defendant threw a lighted squib into a market place, which, being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. (*r*) And the same has been holden where a person pushed a drunken man against another, and thereby hurt him; (*s*) but if such person intended doing a right act,

(*j*) *Read v. Coker*, 13 C. B. 850.

(*k*) *Mortin v. Shoppee*, 3 C. & P. 373, Lord Tenterden, C. J.

(*l*) Bac. Ab. tit. '*Assault and Battery*'

(*B*). 1 Hawk. P. C. c. 62, s. 2.

(*m*) 4 Blac. Com. 120.

(*n*) *Termes de la ley*, '*Battery*,' 1 Hawk. P. C. c. 62, s. 1. Bac. Ab. tit. '*Assault and Battery*' (A).

(*o*) *R. v. Day*, 1 Cox, C. C. 207, Parke, B.

(*p*) *Innes v. Wylie*, 1 C. & K. 257, Lord Denman, C. J.

(*q*) See the precedents for assaults of this kind, Cro. Circ. Comp. 82. 3 Chit. Crim. L. 823, 824, 825. 2 Starkie, 388, 389.

(*r*) *Scott v. Shepherd*, 2 Blac. Rep. 892, by three judges; Blackstone, J., *contra*; 3 Wils. 403, S. C.

(*s*) *Short v. Lovejoy*, *cor. Lee*, C. J. 1752. Bull. Ni. Pri. 16.

#### AMERICAN NOTE.

<sup>1</sup> As to assault by administering a drug, see *C. v. Stratton*, 114 Mass. 303; 19 Am. R. 350. It is not an assault in England. *R. v. Hanson*, 2 C. & K. 912.



as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable. (t)

Where a mother left her child, ten days old, at the bottom of a dry ditch, by which there was a path, and a lane separated from the ditch by a hedge; Parke, B., is reported to have said that 'there were no marks of violence on the child, and it does not appear in the result that the child actually experienced any inconvenience, as it was providentially found soon after it was exposed, and therefore, although it is said in some of the books that an exposure to the inclemency of the weather may amount to an assault, yet, if that be so at all, it can only be when the person suffers a hurt or injury of some kind or other from the exposure. (w) But where the defendants told the mother of a child of which she had been delivered that it was to be taken to a nursery or institution to be brought up, and they put the child in a bag and hung it upon some park-pales at the side of a footpath, and it was likely that the putting a child of so tender an age into a bag and hanging the bag on the pales would cause its death; Tindal, C. J., held that the defendants were guilty of an assault; for the mother gave consent on the pretext that the child was to be taken to some institution, and as that pretext was false, it was no consent at all. (x)

But if one has an idiot brother, who is bedridden in his house, and he keeps him in a dark room, without sufficient warmth or clothing, this is not an assault or imprisonment. (y) Where parish officers, by force and against her consent, cut off the hair of a young woman who was an inmate of a workhouse, it was held an assault. (z)

A master took very indecent liberties with a female scholar of the age of thirteen, by putting her hand into his breeches, pulling up her petticoats, and putting his private parts to hers: she did not resist, but it was against her will. The jury found him guilty of an assault with intent to commit a rape, and also of a common assault; and the judges thought the finding as to the latter clearly right. (a) A girl of sixteen was taken by her parents to the defendant, a German quack, on account of fits, by which she was afflicted; he said he would cure her, and bid her come

(t) *Ib. ibid.*

(w) *R. v. Renshaw*, 2 Cox, C. C. 285, Parke, B. See *R. v. Ridley*, 2 Campb. 650. As to cases of exposing children, see *ante*, p. 286.

(x) *R. v. March*, 1 C. & K. 496. The C. J. cautiously avoided saying that it would not have been an assault if the mother had consented to all that had been done; and it is clear that a mother may be guilty of a battery on a child by actual striking, *quære* whether, when she does or consents to an unlawful handling or disposition of her child, she is not guilty of a battery; for what is a battery but an unlawful touching of the person of another? *R. v. Renshaw*, therefore, seems open to doubt on this ground; and also on the further ground

that it seems to make the question, whether the act of the prisoner was a battery or not, depend on the result of that act; whereas, it is conceived that that act was either a battery or not a battery at the moment it was committed. It is confidently submitted that the instant a mother deposits a child with intent to abandon it, as that is an unlawful act, which she can neither justify nor excuse, she is guilty of a battery. C. S. G. See *ante*, p. 287.

(y) *R. v. Smith*, 2 C. & P. 449, Burrough, J.

(z) *Forde v. Skinner*, 4 C. & P. 239, Bayley, J.

(a) *R. v. Nichol*, MS. Bayley, J., and R. & R. 130. *R. v. M'Gavaron*, 3 C. & K. 320, Williams, J. S. P.

again the next morning; she went accordingly the next morning by herself, and he told her she must strip naked; she said she would not. He said she must, or he could not do any good. She began to untie her dress, and he stripped off all her clothes; she did nothing; he pulled off everything; she told him she did not like to be stripped in that manner. When she was naked, he rubbed her with a liquid. The case was left to the jury to consider whether the defendant believed that stripping the girl would assist his judgment, or whether he did not strip her wantonly, without thinking it necessary; and they were told that the making her strip and pulling off her clothes might, under the latter circumstances, justify a verdict for an assault. The jury found the defendant guilty; and, upon a case reserved, it was held that the conviction was right. (b) Formerly if a girl or boy under thirteen consented to an act of indecency there could be no conviction for indecent assault. But now as we have seen (*ante*, p. 241) by 43 & 44 Vict. c. 45, it shall be no defence to a charge for indecent assault on a young person under thirteen that he or she consented. (c)

Where a prize or other fight takes place, and a number of persons are assembled to witness it, if they have gone thither for the purpose of seeing the combatants strike each other, and were present when they did so, they are all in point of law guilty of an assault; and there is no distinction between those who concur in the act and those who fight; (d) and it is not at all material which party struck the first blow, for if several are in concert, encouraging one another and co-operating, they are all equally guilty, though one only committed the actual assault. (e) And if persons are voluntarily present, the mere presence unexplained may, it seems, afford some evidence for the consideration of a jury, although voluntary presence would not of itself be necessarily conclusive evidence of an assault. (f)

Where an act is done with the consent of a party it is not an assault; for in order to support a charge of assault such an assault must be proved as could not be justified if an action were brought for it, and leave and licence pleaded.

If resistance be prevented by fraud it is an assault. If a man, therefore, have connection with a married woman, under pretence of being her husband, he is guilty of an assault. (g)

Where two boys of eight years of age submitted to indecent acts on the part of a grown-up man in ignorance of the nature of the acts to be done and done, the man was held to be rightly convicted of an indecent assault. (h) Where a man knowing that he had a foul disease, induced a girl of thirteen, who was ignorant of his condition, to consent to sleep with him, and he infected her; it was held

(b) *R. v. Rosinski*, MS. Bayley, J., and R. & M. 19. S. C. 1 Lew. 11; and see *R. v. Case*, 1 Den. C. C. 580, *ante*, p. 229.

(c) See also 48 & 49 Vict. c. 69, *ante*, p. 241.

(d) *R. v. Perkins*, 4 C. & P. 537. Patterson, J. *R. v. Hunt*, 1 Cox, C. C. 177, S. P. *ante*, p. 179.

(e) Anonymous, 1 Lewin, 17, per Bayley, J. *R. v. Lewis*, 1 C. & K. 419,

Coleridge, J. See also *R. v. Coney*, 8 Q. B. D. 534.

(f) *R. v. Coney*, 8 Q. B. D. 534, *ante*, p. 180.

(g) *R. v. Williams*, 8 C. & P. 286, R. v. Saunders, *ibid.* 265. See these cases, *ante*, p. 228.

(h) *R. v. Lock*, 42 L. J. M. C. 5. See *R. v. Woolaston*, 12 Cox, C. C. R. 180.

that he might be convicted of an indecent assault. (i) But where a prisoner, knowing that he was diseased, had connection with his wife, who was ignorant of the fact, and infected her, it was held that he would not be convicted either of unlawfully and maliciously inflicting grievous bodily harm upon her, or of an assault occasioning actual bodily harm under either sec. 20 or sec. 47 of 24 & 25 Vict. c. 100. (ii)

An *unlawful imprisonment* is also an assault; for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the King's peace, a loss which the state sustains by the confinement of one of its members, and an infringement of the good order of society. (j) To constitute the injury of false imprisonment, there must be an unlawful detention of the person. With respect to the detention, it may be laid down that every confinement of the person, whether it be in a common prison or in a private house, or by a forcible detaining in the public streets, will be sufficient. (k) And such detention will be unlawful unless there be some sufficient authority for it, arising either from some process from the Courts of justice, or from some warrant of a legal officer, having power to commit under his hand and seal, and expressing the cause of such commitment; or arising

(i) *R. v. Bennett*, 4 F. & F. 1105. *Willes, J. R. v. Sinclair*, 13 Cox, C. C. 28. These cases may be supported on the ground that the girl was asked and did not consent. See judgment of Stephen, J., in *R. v. Clarence, infra*.

(ii) *R. v. Clarence*, 22 Q. B. D. 23, per Lord Coleridge, C. J., Pollock and Huddleston, BB., Stephen, Manisty, Mathew, A. L. Smith, Wills, and Grantham, JJ. (Field, Hawkins, Day, and Charles, JJ., dissenting.)

(j) 1 Hawk. P. C. c. 60, s. 7. 4 Blac. Com. 218. And see precedents of indictments for assaults and false imprisonment, Cro. Circ. Comp. 79. 2 Stark. 385, 386. 3 Chit. Crim. L. 835, *et seq.* As to such false imprisonment as amounts to kidnapping, &c., see *ante*, p. 269, *et seq.*

(k) 2 Inst. 589. Com. Dig. tit. '*Imprisonment*' (G). 3 Blac. Com. 127. In *Bird v. Jones*, 7 Q. B. 742, the majority of the Court held that where the plaintiff in attempting to go in a particular direction was prevented from going in any direction but one, not being that in which he endeavoured to pass, it was not an imprisonment, and this, whether the plaintiff had or had not a right to pass in the first-mentioned direction. 'A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the con-

ception only; it may itself be movable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing: he must be prevented from leaving that place, within the ambit of which the party imprisoning him would confine him, except by prison breach.' Per Coleridge, J., *ibid.* 'In general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and it is not necessary in order to constitute an imprisonment that a man's person should be touched. The compelling a man to go in a given direction against his will may amount to imprisonment.' 'Imprisonment is a total restraint of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him.' Per Patteson, J., *ibid.*<sup>1</sup> See also *Warner v. Riddiford*, 4 C. B. (N. S.) 180. Where the schoolmaster of a Board School kept in a child for not preparing his home lessons, it was held that he was liable to be convicted of an assault, since the Education Acts do not authorise the setting of home lessons. *Hunter v. Johnson*, 13 Q. B. D. 225. A Board School master is however justified in flogging a boy for misconduct on his way to or from school. *Cleary v. Booth*, 1893, 1 Q. B. 465.

#### AMERICAN NOTE.

<sup>1</sup> In America, it has been held that where a ferryman by mere words detained a passenger in order to obtain from him a toll

which was not due, that was a false imprisonment amounting to an assault. *Smith v. S.*, 7 Humph. 43.

from some other special cause sanctioned, for the necessity of the thing, either by common law or by Act of Parliament. (*l*) And the detention will be unlawful, though the warrant or process upon which it is made be regular, in case they are executed at an unlawful time, as on a Sunday; or in a place privileged from arrests, as in the verge of the King's court. (*m*) Especial provision is made concerning the arrest of foreign ambassadors, or other foreign public ministers, and their domestics, or domestic servants, by the statute 7 Anne, c. 12, which makes any process against them, or their goods and chattels, altogether void; and provides, that the persons prosecuting, soliciting, or executing such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment, as the Lord Chancellor and the two Chief Justices, or any two of them, shall think fit. But no trader within the description of the bankrupt laws, who shall be in the service of any ambassador or public minister, is to be privileged or protected by this Act; nor is any one to be punished for arresting an ambassador's servant, unless the name of such servant be registered in the office of one of the principal secretaries of state, and by him transmitted to the sheriffs of London and Middlesex, or their under-sheriffs or deputies. (*n*)

It has been supposed that every imprisonment includes a battery: (*o*) but this doctrine was denied in one case, where it was said by the Court that it was absurd to contend that every imprisonment included a battery. (*p*)

To lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is said to be no battery. (*q*) So if one lays his hand gently, and not in a hostile manner, on another, in order to attract his attention, it is not an assault. (*r*) If one soldier hurts another by discharging a gun in exercise, it will not be a battery. (*s*) And it is no battery if, by a sudden fright, a horse runs away with his rider, and runs against a man. (*t*) So where upon an indictment for throwing down skins into

(*l*) 3 Blac. Com. 127.

(*m*) Id. *ibid.* 29 Car. 2, c. 7. And see further as to unlawful imprisonments, Com. Dig. tit. 'Imprisonment' (H). Bac. Ab. tit. 'Trespass' (D). 3. 2 Selw. N. P. tit. 'Imprisonment.'

(*n*) See as to the occasion of passing this Act, 1 Blac. Com. 254, 255, 256; and as to the construction of it, the cases collected in 2 Evans's Cl. Stat. Part IV. Cl. iii., No. 21.

(*o*) Bull. N. P. c. 4, p. 22; and the opinion was adopted by Lord Kenyon, in *Oxley v. Flower* and another, 2 Selw. N. P. tit. 'Imprisonment' (I).

(*p*) *Emmett v. Lyne*, 1 New Rep. 255.

(*q*) 1 Hawk. P. C. c. 62, s. 2. Bac. Ab. tit. 'Assault and Battery' (B). See *Griffin v. Parsons*, Gloucester Lent. Ass. 1754.

Selw. N. P. tit. 'Assault and Battery,' 26, note (1), 7 Edit.

(*r*) *Coward v. Baddeley*, 4 H. & N. 478. 28 L. J. Ex. 260.

(*s*) *Weaver v. Ward*, Hob. 134. 2 Roll. Ab. 548. Bac. Ab. tit. 'Assault and Battery' (B). But if the act were done without sufficient caution, the soldier would be liable to an action at the suit of the party injured: for no man will be excused from a trespass, unless it be shewn to have been caused by inevitable necessity, and entirely without his fault, *Dickenson v. Watson*, Sir T. Jones, 205. *Underwood v. Hewson*, 1 Str. 595. 2 Blac. R. 896. Selw. N. P. tit. 'Assault and Battery,' 27. <sup>1</sup>

(*t*) *Gibbons v. Pepper*, 4 Mod. 405. But if the horse's running against the man were

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<sup>1</sup> See also *Bishop*, ii. ss. 60, 61.

a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendants were acquitted. (u) It seems also that if two, by consent, play at cudgels, and one happen to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity. (v)

If one of two persons, who are fighting, strike at the other, and hit a third person unintentionally, this is a battery, and cannot be justified on the ground that it was accidental. (w)

The prisoner, in striking at a man with whom he had been fighting, struck and wounded a woman beside him. He was indicted for unlawfully and maliciously wounding the woman. The jury found that the blow was unlawful and malicious, but the striking of the woman was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected. The prisoner was convicted, and it was held that the conviction was right. (ww)

occasioned by a third person whipping him, such third person would be the trespasser. Bac. Ab. tit. 'Assault and Battery,' (B). And, upon the principles which have been before mentioned, such an act in a third person, causing death to any one, may, under certain circumstances, amount to felony. *Ante*, p. 173. The plaintiff was walking along a public street when the defendant, seated on the box of his carriage, which was drawn by two horses and driven by a man then under his control, came down a cross street. The horses, frightened by the barking of a dog, ran away. The driver was unable to hold them in, but told the defendant to leave them to him. The defendant accordingly sat passive, while the driver, trying to turn the horses so as to prevent them from running into a shop window opposite, pulled them aside towards the spot where the plaintiff then happened to be; but, on nearing her, endeavoured vainly to draw them away from her. They ran against her, and she, being hurt, sued the defendant for negligence and trespass. The jury found the defendant free from negligence, and that the occurrence was mere accident. Held, that he was not liable in trespass. *Holmes v. Mather*, 44 L. J. Ex. 176.

(u) *R. v. Gill* and another, 1 Str. 190.

(v) Bac. Ab. tit. 'Assault and Battery' (B), referring to *Dalt. c. 22*. Bro. Coron. 229. But in the notes to Bac. Ab. *ubi supra*, the case of *Boulter v. Clarke*, Abingdon Ass. cor. Parker, C. B., Bull. N. P. 16, is referred to, in which it was ruled that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful; and the

case of *Matthew v. Ollerton*, Comb. 218, is also referred to as an authority, that if one license another to beat him, such licence is no defence, because it is against the peace. And see *ante*, p. 179, *et seq.* as to the criminality of some games or sports.<sup>1</sup>

(w) *James v. Campbell*, 5 C. & P. 372, *Bosanquet, J.* As the blow, if it had struck the party at whom it was aimed, would have been a battery, so it was though it struck another person; just in the same way as if a blow intended for A. hit and kill B., it will be murder or manslaughter, according as it would have been murder or manslaughter, if the blow had hit A. and killed him. C. S. G. In *Hall v. Fearnley*, 3 Q. B. 919, it was held that inevitable accident arising from superior agency is a defence under the general issue; but that a defence which admits that the accident resulted from an act of the defendant must be pleaded. In an action for assault, where the defendant had thrown a stick, and hit the plaintiff, but it did not appear that he threw the stick with the intention of hitting the plaintiff; *Rolfe, B.*, is reported to have held that this was not sufficient to constitute an assault, as it did not appear for what purpose the stick was thrown; and it was therefore fair to conclude that it was thrown for a proper purpose, and that the striking of the plaintiff was merely accidental. *Alderson v. Waistell*, 1 C. & K. 358. But this ruling may well be doubted, at all events as far as relates to a civil suit. See *ante*, p. 310, note (s). C. S. G.

(ww) *R. v. Latimer*, 17 Q. B. D. 359. In discussing *R. v. Pembliton*, L. R. 2 C. C. 119, *Bowen, L. J.*, suggested that, if in *R. v. Latimer* the facts were that the prisoner

#### AMERICAN NOTE.

<sup>1</sup> In America, it is doubtful how far this is a defence. It seems, however, that a fight by agreement is not an assault. *S. v. Beck*,

1 Hill, S. C. 363; 26 Am. D. 190. *Champer v. S.*, 14 Ohio St. 457. *C. v. Collberg*, 119 Mass. 350.

By the Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34), s. 3, 'Where in the course of a public exhibition or performance, which in its nature is dangerous to the life or limb of a child' under the age of fourteen years 'taking part therein, any accident causing actual bodily harm occurs to any such child, the employer of such child shall be liable to be indicted as having committed an assault, and the Court before whom such employer is convicted on indictment shall have the power of awarding compensation not exceeding £20, to be paid by such employer to the child, or to some person named by the Court on behalf of the child, for the bodily injury so occasioned, provided that no person shall be punished twice for the same offence.' (x)

In some cases force used against the person of another may be justified. Thus, if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him, in the attempt to take him; or if a parent, in a reasonable manner, chastise his child,<sup>1</sup> or a schoolmaster his scholar; (xx) or if one confine a friend who is mad, and bind him, &c., in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; he cannot be indicted for assault or battery. (y) So if A. beat B. (without wounding him, or throwing at him a dangerous weapon), who is wrongfully endeavouring, with violence, to dispossess him of his lands, or of the goods, either of himself or of any other person, which have been delivered to him to be kept, and will not desist upon A.'s laying his hands gently upon him, and disturbing him; or if a man beat, wound, or maim one who is making an assault upon his own person, or that of his wife, parent, child, or master; or if a man fight with, or beat, one who attempts to kill any stranger; in these cases also it seems that the party may justify the assault and battery. (yy) It has been holden that a master may not justify an assault in defence of his servant, because he might have an action for the loss of his service; (z) but a different opinion has been entertained on this point; (a) and in one case Lord Mansfield said, 'I cannot say that a master interposing, when his servant is assaulted, is not justifiable under the circumstances of the case; as well as a servant interposing for his master; it rests on the relation between master and

meant to strike a pane of glass, and hit a person by accident, it might have been that the malice shewn would have been insufficient.

(x) It is difficult to see how the offence created by this section should be stated in the indictment, and it does not appear clear whether the compensation is to be in lieu of or in addition to punishment. The provisions of 57 & 58 Vict. c. 41 (see *ante*, p. 287, *et seq.*), as to presumption of age, evidence, &c., apply to proceedings under this Act.

(xx) The power is expressly saved by sec. 24 of the Prevention of Cruelty to Children Act, 1894, see *ante*, p. 293.

(y) 1 Hawk. P. C. c. 60, s. 23; Bac. Ab. tit. 'Assault and Battery' (C).

(yy) 1 Hawk. P. C. c. 60, s. 23, and the numerous authorities there cited. Bac. Ab. tit. 'Assault and Battery' (C).

(z) *Leward v. Baseley*, 1 Ld. Raym. 62. 1 Salk. 407. Bull. N. P. 18.

(a) 1 Hawk. P. C. c. 60, s. 24.

#### AMERICAN NOTE.

<sup>1</sup> See as to correction of children in America, *Johnston v. S.*, 2 Humph. 283. S. v. Harris, 63 N. C. 1. C. v. Randall, 4

Gray, 36. A master has no right to chastise his servant. C. v. Bird, Ashm. 267.

servant.' (b) It is said that a servant may not justify beating another in defence of his master's son, though he were commanded to do so by the master, because he is not a servant to the son; and that, for the like reason, a tenant may not beat another in defence of his landlord. (c) A wife may justify an assault in defence of her husband. (d) An upper servant cannot justify beating an under servant for disobedience of orders. (e)

*Son assault demesne* is a good defence to an indictment. (f) If one man strikes another a blow, or does that which amounts to an assault on him, that other has a right to defend himself, and to strike a blow in his defence, but he has no right to revenge himself; and if when all danger is past he strikes a blow not necessary for his defence, he commits an assault and battery. (g) It is not, however, every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger; unless it happened accidentally, without any cruel or malignant intention, or after the blood was heated in the scuffle, but it must appear that the assault was in some decree proportionable to the mayhem. (h) If a party raise up a hand against another, within a distance capable of the latter being struck, the other may strike in his own defence, to prevent him, but he must not use a greater degree of force than is necessary. (i) For if the violence used be more than was necessary to repel the assault, the party may be convicted of an assault. (j)

It has been holden that a defendant may justify even a *mayhem*, if done by him as an officer in the army, for disobeying orders; and that he may give in evidence the sentence of a council of war, upon a petition against him by the plaintiff; and that if, by the sentence, the petition is dismissed, it will be conclusive evidence in favour of the defendant. (k)

In cases where officers have authority to arrest, they are justified in laying hands upon the persons to be arrested, in order to do so. There may be cases in which a person may justify laying hands upon another in order to serve him with civil process. (l)

But in all such cases the force used must be only so great as is

(b) *Tickel v. Read*, Lofft. 215.

(c) 1 Hawk. P. C. c. 60, s. 24.

(d) *Leward v. Baseley*, 1 Ld. Raym. 62.

(e) *R. v. Huntley*, 3 C. & K. 142, Platt, B.

(f) 1 Hawk. P. C. c. 62, s. 3.

(g) *R. v. Driscoll*, C. & M. 214, Coleridge, J. Lord Coke (Co. Litt. 162 a) cites from Bracton, *vim vi repellere licet, modo fiat moderamine inculpate tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam*. Bull. N. P. 18. Mere words will not justify an assault. As to when

mere words will reduce a murder to manslaughter, see *ante*, pp. 38, 172.<sup>1</sup>

(h) 1 East, P. C. c. 7, s. 9, p. 402.

(i) Per Parke, B. *Anonymous*, 2 Lew. 48.

(j) *R. v. Mabel*, 9 C. & P. 474, Parke, B. *R. v. Whalley*, 7 C. & P. 245, Williams, J.

(k) *Lane v. Degberg*, 11 Wm. 3, per Treby, C. J. Bull. N. P. 19.

(l) *Harrison v. Hodgson*, 10 B. & C. 445. See 2 Roll. Abr. 546.

#### AMERICAN NOTE.

<sup>1</sup> In America, it seems to have been frequently held that words will not justify a blow. *S. v. Wood*, 1 Bay, 351. *Coleman v. S.*, 28 Ga. 78. *S. v. Herrington*, 21 Ark. 195. *Smith v. S.*, 8 Lea, 402. *S. v. Elliot*, 90

Mo. 350. *Reid v. S.*, 71 Ga. 865. *Winfield v. S.*, 3 Greene, Iowa, 339. *Daniel v. S.*, 10 Lea, 261. In Alabama, and perhaps in some other States, words will (by statute) justify a blow. Bishop, ii. s. 40.

necessary for the purpose of effecting the object in view, and if there be an excess of violence the officer will be guilty of an assault. (m) Where one of the Marshals of the city of London, whose duty it was on the day of a public meeting in Guildhall, to see that a passage was kept for the transit of the carriages of the members of the corporation and others, directed a person in the front of the crowd to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, saying, that he would make him, it was held that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way, and that consequently the Marshal had been guilty of too violent an exertion of his authority. (n)

An officer having a warrant to search for an illegal still in the defendant's house, the defendant asked to see the warrant, and it was given him, and he then refused to return it, upon which the officer endeavoured by force to retake it, and a scuffle ensued, it was held that the officer was justified in using so much violence as was necessary to retake the warrant, and no more. (o)

It should be observed, with respect to an assault by a man on a party endeavouring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such case to oppose force to force: therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. (p) If a person enters another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary), without a previous request to depart: but if the person enters quietly, the other party cannot justify turning him out without a previous request. (q) For 'there is a manifest distinction between endeavouring to turn a man out of a house or close, into which he has

(m) *Levy v. Edwards*, 1 C. & P. 40, Burrough, J.

(n) *Imason v. Cope*, 5 C. & P. 193, Tindal, C. J.

(o) *R. v. Milton*, M. & M. 107, Lord Tenterden, C. J. S. C. 3 C. & P. 31.

(p) *Green v. Goddard*, 2 Salk. 641. In a case of this kind, however, it should seem that the violence must be considerable, and continuing, in order to justify the application of force by the owner, without some previous request to depart; at least, if the force applied be more than would be justified under a *molliter manus imposuit*: for in a case of assault and battery, where the de-

fendant pleaded *son assault demesne*, and the plaintiff replied that he was possessed of a certain close, and that the defendant broke the gate and chased his horses in the close, and that he, for the defending his possession, *molliter insultum fecit* upon the defendant, the replication was adjudged to be bad; and that it should have been *molliter manus imposuit*, as the plaintiff could not justify an assault in defence of his possession. *Leward v. Baseley*, 1 Lord Raym. 62.<sup>1</sup>

(q) *Tullay v. Reed*, 1 C. & P. 6, J. A. Park, J. And see Meade's case, 1 Lew. 184. Wild's case, 2 Lew. 214.

#### AMERICAN NOTE.

<sup>1</sup> Mr. Bishop thus states the American law on the subject: "The defending party can exercise no power and apply no instru-

ment beyond what will simply prove effectual." Bishop, i. s. 482.



previously entered quietly, and resisting a forcible attempt to enter: in the first case a request is necessary; in the latter not.' (r) So, if one come forcibly and take away another's goods, the owner may oppose him at once, for there is no time to make a request. (s) And the owner of goods (or his servant, acting by his command) which are wrongfully in the possession of another, may, after requesting him to deliver them up, justify an assault in order to repossess himself of them. (t) It seems also that a person who has a right of way or other easement may justify using so much force as may be necessary to enable him to exercise that right, or to prevent another from interrupting it. (u) But, in general, unless there be violence in the trespass, a party should not, either in defence of his person, or his real or personal property, begin by striking the trespasser, but should request him to depart or desist; and, if that is refused, should gently lay his hands upon him in the first instance, and not proceed with greater force than is made necessary by resistance. (v) Thus, where a churchwarden justified taking off the hat of a person who wore it in church, at the time of divine service, the plea stated, that he first requested the plaintiff to be uncovered, and that the plaintiff refused. (w) And in all cases where the force used is justified, as not amounting to an assault, under the particular circumstances of the case, it must appear that it was not greater than was reasonably necessary to accomplish the lawful purpose intended to be effected. (x) Therefore, though an offer to strike the defendant, first made by the prosecutor, is a sufficient assault by him to justify the defendant in striking, without waiting till the prosecutor had actually struck him first; yet, even a prior assault will not justify a battery, if such battery be extreme; and it will be matter of evidence, whether the retaliation by the defendant were excessive, and out of all proportion to the necessity or provocation received. (y)

The party injured may proceed against the defendant by action and indictment for the same assault; and the court in which the action is brought will not compel him to make his election to pursue either the one or the other; for the fine to the King, upon the criminal prosecution, and the damages to the party in the civil action, are perfectly distinct in their natures, (z) but the Court of Queen's Bench have refused to sentence a party convicted of an assault, while an action was pending for the same assault. (a)

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each

(r) *Polkinghorn v. Wright*, 8 Q. B. 197.

(s) *Green v. Goddard*, 2 Salk. 641.

(t) *Blades v. Higgs*, 10 C. B. (N. S.) 713.

(u) See the judgment of Patteson, J., in *Bird v. Jones*, 7 Q. B. 742. 2 Roll. Abr. *Trespass*, p. 547 (E), pl. 1 & 2, which rest on 3 Hen. 4, 9, and 11 Hen. 6, 23.

(v) *Weaver v. Bush*, 8 T. R. 78. 1 Selw. N. P. tit. '*Assault and Battery*,' 39, 40.

(w) *Hawe v. Planner*, 1 Saund. 13.

(x) 1 East, P. C. c. 8, s. 1, p. 406.

(y) Bull. N. P. 18. 1 East, P. C. c. 8, s. 1, p. 406. See *ante*, p. 313.

(z) *Jones v. Clay*, 1 Bos. & Pul. 191. 1 Selw. N. P. tit. '*Assault and Battery*,' 27, note (2). 1 Hawk. P. C. c. 62, s. 4. Bac. Ab. tit. '*Assault and Battery*' (D).

(a) *R. v. Mahon*, 4 A. & E. 575, and see *Ex parte*—, Gent., *ibid.*, note, and *R. v. Gwilt*, 11 A. & E. 587.

assault being a distinct offence. (b) But the case has been subsequently treated as one which was not well considered: and the Court said, 'Cannot the King call a man to account for a breach of the peace, because he broke two heads instead of one?' (c)

As an assault is merely a misdemeanor, it is competent to the prosecutor to insert several counts in the same indictment for different assaults; and it has long been the constant practice to receive evidence of several assaults upon the same indictment; (e) for in offences inferior to felony the practice of quashing the indictment, or calling upon the prosecutor to elect on which charge he will proceed, does not exist. (f)

Where an indictment consisted of two counts, one for riot, the other for an assault, and the grand jury only found it a true bill as to the count for an assault, and endorsed *ignoramus* on the count for a riot, a motion was made on the part of the prosecutor to quash it, on the ground that the grand jury should have found the whole to have been a true bill, or have rejected the indictment altogether; but the Court held, that as there were two distinct counts, the finding a true bill as to one count only, and rejecting the other, left the indictment, as to the count which the jury had affirmed, just as if there had originally been only that one count. (g)

Whatever is a legal justification or excuse for an assault or imprisonment, such as *son assault demesne*, the arrest of a felon, &c., may, upon an indictment, be given in evidence under the general issue. (h)

On an indictment against two defendants for committing an assault, the prosecutor proved an assault committed by one, with which the other had nothing to do, and it was urged that the latter was entitled to be acquitted, as an assault answering the description of that in the indictment had been proved, and, as there was only one count, more than one assault could not be proved; and it was held that the latter must be acquitted. It was then objected, for the other defendant, that as the count was for a joint assault, this defendant could not be convicted of an assault by him alone, and that he only came prepared to answer that joint assault; and it was held that this defendant must be acquitted. If the indictment had charged that the defendants assaulted the prosecutor, the result might have been different; but here one specific assault is mentioned, and if they cannot be convicted of that, they must be ac-

(b) R. v. Clendon, 2 Lord Raym. 1572.  
2 Str. 870.<sup>1</sup>

(c) Per Cur. in R. v. Benfield and Saunders, 2 Burr. 984.

(e) 1 Chit. Crim. L. 254. R. v. Davies, 5 Cox, C. C. 328, ante, p. 237.

(f) Ibid.

(g) R. v. Fieldhouse, Cowp. 325.

(h) 1 Hawk. P. C. c. 62, s. 3. Bac. Ab. tit. 'Assault and Battery.' 1 East. P. C. c. 8, s. 1, p. 406, and c. 9, s. 1, p. 428.

#### AMERICAN NOTE.

<sup>1</sup> It should seem that in America where there is one blow and two persons injured, the prosecutor may treat the offence as one offence against both, or as two offences against either; but it is doubtful in the latter case whether a conviction against one

would be a bar to a conviction against the other. It seems that by one act (as by firing a gun) a man may be tried as for several distinct offences, but it is doubtful. Bishop, i. s. 1061.

quitted. (i) And where on an indictment containing one count for an assault against two persons, an assault by one was proved, in which the other was not at all implicated, it was held that one assault to which the indictment was applicable having been proved, evidence of other assaults could not be gone into. (j)

As every battery includes an assault, (k) it follows, that on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery it is sufficient. (l)

Wherever a count for a misdemeanor contains a charge of assault accompanied with circumstances of greater or less aggravation, the jury may find the defendant guilty of a common assault, and acquit him of the circumstances of aggravation. (m)

This offence was punishable as a misdemeanor; and the punishment usually inflicted was fine, imprisonment, and the finding of sureties to keep the peace. (n)

But now, by the 24 & 25 Vict. c. 100, s. 47, 'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour.' (p)

As to the power of the Court to order the payment of the prosecutor's costs by the defendant, see Vol. I. p. 94.

By the 24 & 25 Vict. c. 100, s. 42, 'Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint *by or on behalf* of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned *with or without* hard labour, for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction or within such period as the said justices shall

(i) *R. v. Traughton*, 1 Cox, C. C. 197, Bullock, Comr., after consulting the Recorder. The latter ruling is clearly wrong; for it never yet was doubted that on a joint charge against two for any offence not requiring the participation of several, as conspiracy, &c., either might be convicted, though there was no evidence against the other; and the first point was decided on the ground that the assault proved did apply to the charge in the indictment. So that the two rulings are inconsistent with each other. C. S. G.

(j) *R. v. Gordon*, 1 Cox, C. C. 259. Bullock, Comr., after consulting the Recorder. This ruling is directly contrary to the second ruling in the last case. The point is not a question of law: it is merely a question for the discretion of the Court,

and as any number of assaults may be tried under one indictment containing a count for each, there seems no good reason for confining the evidence on one count to the first assault that may happen to be proved. *Stante v. Prickett*, 1 Camp. 437, was cited in support of the objection. C. S. G.

(k) *Ante*, p. 306.

(l) 1 Hawk. P. C. c. 62, s. 1.

(m) *R. v. Oliver*, Bell, C. C. 287. *R. v. Yeadon*, 1 L. & C. 81. *R. v. Taylor*, L. R. 1 C. C. R. 194. See *post*, *Evidence*, that it is sufficient to prove so much of the charge as constitutes an offence punishable by law.

(n) 4 Blac. Com. 217. 1 East, P. C. c. 8, s. 1, p. 406, and c. 9, s. 1, p. 428.

(p) The first part of this clause is taken from the 14 & 15 Vict. c. 100, s. 29.

at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid.' (q)

Sec. 43. 'When any person shall be charged before two justices of the peace with an assault or battery upon any male child whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of twenty pounds, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and, if the justices shall so think fit, in any of the said cases, shall be bound to keep the peace and be of good behaviour for any period not exceeding six months from the expiration of such sentence.' (r)

By 41 Vict. c. 19, 'If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband, and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty, and such order may further provide (1) That the husband shall pay to his wife such weekly sum as the Court or magistrate may consider to be in accordance with his means and with any means which the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable, and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation, and the

(q) This clause is framed from the 9 Geo. 4, c. 31, s. 27. Under that section the complaint could only be made by the party aggrieved. *R. v. Deny*, 2 L. M. & P. 230. This clause, in order to enable parents and others to complain on the part of an injured child, permits the complaint to be made by any one on its behalf, and so it might under the 14 & 15 Vict. c. 92, s. 2 (1), which is assimilated in this clause with the 9 Geo. 4, c. 31, s. 27. But where a complaint has been made the justices may proceed, though the parties have made a compromise. *R. v. Wiltshire*, 8 Law T. 242. But see the 25 & 26 Vict. c. 50, s. 9, which was passed for the very purpose of enabling justices in Ireland to proceed, even where the party assaulted declined to complain. By the 9 Geo. 4, c. 31, s. 27, the

justices had only power to fine in the first instance; by the 14 & 15 Vict. c. 92, s. 2, they may either fine or commit for two months; and under this clause they may either fine or commit. This clause also gives the justices power to commit to hard labour either in the first instance, or on default of payment of a fine. All summary proceedings under this clause should be taken under the 11 & 12 Vict. c. 43, where the offence is committed in England, except in London and the Metropolitan Police district, and in Ireland under the 14 & 15 Vict. c. 93; see sec. 76 of the Act.

(r) This clause is taken from the 16 & 17 Vict. c. 30, s. 1. The provisions of 57 & 58 Vict. c. 41 (see *ante*, p. 287, *et seq.*), as to presumption of age, evidence, &c., apply to proceedings under this section.

Court or magistrate by whom any such order for payment of money shall be made shall have power from time to time to vary the same on the application of either the husband or the wife upon proof that the means of the husband or wife have been altered in amount since the original order (or any subsequent order varying it) shall have been made. (2) That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate, be given to the wife.

‘Provided always that no order for the payment of money by the husband, or for the custody of the children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of money or for the custody of children may be discharged by the Court or magistrate by whom such order was made, upon proof that the wife has since the making thereof been guilty of adultery, and provided also that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice.’

Sec. 44. ‘If the justices upon the hearing of any such case of assault or battery upon the merits where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith (s) make out a certificate (t) under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.’ (u)

Sec. 45. ‘If any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved, shall have ob-

(s) In *R. v. Robinson*, 12 A. & E. 672, it was held that the certificate must be given before the justices separated; but this was doubted in *Thompson v. Gibson*, 8 M. & W. 281. And it is now held that the act of granting the certificate is not judicial or discretionary, but ministerial only, and therefore ‘forthwith’ does not mean forthwith upon the dismissal of the complaint, but forthwith upon the demand of it by the person entitled to it. *Costar v. Hetherington*, 1 E. & E. 802. *Hancock v. Somes*, 1 E. & E. 795.

(t) The certificate must state on which of the three grounds the complaint was dismissed, *Skuse v. Davis*, 10 A. & E. 635; and must be specially pleaded in an action. *Harding v. King*, 6 C. & P. 427. The production of the certificate is sufficient evidence of the dismissal by the justices without proof of their signature or official character, 8 & 9 Vict. c. 113, s. 1; and if the defendant appeared before the justices, the recital in the certificate of the fact of a complaint having been made, and of a summons having been issued, is sufficient evidence of those facts, without producing the complaint or summons. *R. v. Westley*, 11 Cox, 139.

(u) This clause is limited to the case where a complaint is made by or on behalf of the party aggrieved. The 9 Geo. 4, c. 31, s. 27, only applied to a case where the complaint was made by the party aggrieved, and unless this clause had been limited as it is, any person who had committed an aggravated assault might have got some friend to make a complaint and get the case heard by the justices, on insufficient evidence, and might, by virtue of secs. 44 and 45, have deprived the party aggrieved of any remedy by action or indictment. Under the 9 Geo. 4, c. 31, s. 27, where a party aggrieved made a complaint, and obtained a summons and served it on the defendant, but, before the day for hearing, gave notice, both to the defendant not to attend, and to the magistrates’ clerk that he should not attend, but the defendant attended, and claimed to have the information dismissed, and a certificate of dismissal granted, notwithstanding the prosecutor’s absence, it was held that the justices were warranted in granting such certificate, and that it was a bar to an action for the assault. *Tunncliffe v. Tedd*, 5 C. B. 553. *Vaughton v. Bradshaw*, 9 C. B. (N. S.) 103. Under the present clause these cases are no authority; for in order to obtain a

tained such certificate, or, having been convicted, (*uu*) shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.' (*v*)

Sec. 46. 'Provided, that in case the justices shall find (*w*) the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same: Provided also, that nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title (*x*) to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.'

certificate under it the case must be heard 'upon the merits'; that is, the decision of the justices must be after having heard the evidence. The 14 & 15 Vict. c. 93, s. 21 (*l*.), required the justices to state in the certificate that the dismissal was on the merits, or that the assault was of a trifling or justifiable nature.

(*uu*) *Hartley v. Hindmarsh*, L. R. 1 C. P. 353; 35 L. J. M. C. 255.

(*v*) This clause is taken from the 9 Geo. 4, c. 31, s. 28; and see the 14 & 15 Vict. c. 93, s. 21. See the note to the last section. Several decisions occurred under the former clause, whilst the 1 Vict. c. 85, s. 11, which authorised a conviction of an assault on an indictment for felony, was in force, as to the cases in which a plea of *autrefois* acquit and convict might be sustained, and these will be found, together with remarks upon them, in Greaves' Crim. Acts, p. 71, 2nd Edition; but as that clause was repealed by the 14 & 15 Vict. c. 100, s. 10, there cannot now be a conviction of an assault upon any indictment for felony, and it seems clear that *autrefois* acquit or convict by the common law cannot be pleaded in any case, unless the prisoner might be convicted on the former indictment, either of the whole or at least of part of the criminal charge contained in it. See *R. v. Walker*, 2 M. & Rob. 446. See vol. i. p. 51, note. In *R. v. Elrington*, 1 B. & S. 688, 31 L. J. M. C. 14, 9 Cox, C. C. 86, the first count was for assaulting and doing grievous bodily harm to the prosecutor; the second for assaulting, and doing actual bodily harm to him, and the last for a common assault; and the Court of Queen's Bench held that pleas of a dismissal of a complaint for the same assault under the 9 Geo. 4, c. 31, s. 27, were a bar to the indictment, on the ground that the two first counts only charged the same assault with certain aggravations, and the last only charged the same assault.

A previous summary conviction for assault before justices, under the 24 & 25 Vict. c. 100, s. 42, is not a bar to a subsequent

indictment for manslaughter upon the death of the men assaulted consequent upon the same assault. *Kelly, C. B., diss. R. v. Morris*, 36 L. J. M. C. 84; L. R. 1 C. C. R. 90. See *ante*, p. 44.

It has been held, that the words 'same cause' mean the same assault or same offence, and that the protection given by 24 & 25 Vict. c. 100, s. 45, is not limited to proceedings for the same cause of action. Therefore a person who has been convicted of a common assault on a married woman, and who has paid the whole amount adjudged to be paid, may rely on the protection given by this section as a bar to an action against him by the husband, for the loss he, as such husband, has sustained by the assault on his wife. *Masper v. Brown*, 45 L. J. C. P. 203. But where a servant in the course of his employment commits an assault his release under the section does not exonerate his master. *Dyer v. Munday* (1895), 1 Q. B. 742.

(*w*) Where the defendant had been convicted of a common assault, though it was alleged that the evidence shewed a felonious assault, and a *certiorari* was moved for on the ground that the justices had no jurisdiction, the Court of Queen's Bench held that the justices had found that the assault was not 'accompanied by any attempt to commit felony,' which they had jurisdiction to determine, Lord Tenterden relying especially on the words 'in case the justices shall find the assault or battery to have been accompanied by any attempt to commit felony,' in the 9 Geo. 4, c. 31, s. 29. *Anonymous*, 1 B. & Ad. 382. *S. C.* as *R. v. Virgil*, 1 Lewin, 16. See *In re Thompson*, 6 H. & N. 193, where the information was for unlawfully assaulting and abusing a woman; *Ex parte Thompson*, 3 L. T. 294, and *Wilkinson v. Dutton*, 3 B. & S. 821.

(*x*) See *Latham v. Spalding*, 2 L. M. & P. 378. *R. v. Pearson*, 11 Cox, C. C. Q. B. 493; 39 L. J. M. C. 76.

## SEC. II.

*Of Aggravated Assaults.*<sup>1</sup>

Attempts to murder, or to do some great bodily harm, (z) and assaults with intent to ravish, (a) or to commit an unnatural crime, (b) have been already noticed. Also assaults occurring in the obstruction of officers executing process, (c) in effecting a rescue, (d) in the obstruction of revenue officers, (e) and in the hindering the exportation or circulation of corn, (f) have been mentioned in the course of the Work. The aggravated assaults which remain to be noticed in this place, are principally such as have been made a subject of particular legislative provision; and the peculiar aggravation appears to arise, either from the place in which, or the person upon whom, the assault is committed, or else from the great criminality of the purpose or object intended to be effected.

The 5 & 6 Edw. 6, c. 4, relates to disturbances in *churches and churchyards*; and the second section enacts, 'that if any person or persons shall smite, or lay violent hands upon any other, either in any church or churchyard,' every person so offending shall be deemed excommunicate. (g)

Some points upon the construction of this statute have been mentioned in a former part of this Work; where it was stated, that cathedral churches and churchyards are within it; that it will be no excuse for a person who strikes another in a church, &c., to shew that the other assaulted him; and that the church-wardens and perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands upon those who disturb the

(z) *Ante*, chap. ix. p. 277.

(a) *Ante*, p. 236.

(b) *Ante*, p. 251.

(c) Vol. i. p. 880, *et seq.*

(d) Vol. i. p. 904, *et seq.*

(e) Vol. i. p. 277, *et seq.*

(f) Vol. i. p. 291, *et seq.*

(g) The 9 Geo. 4, c. 31, repealed so much of this Act as related 'to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike as therein mentioned.' So that sec. 2 seems not to be repealed. C. S. G. See *ante*, p. 652.<sup>2</sup>

## AMERICAN NOTES.

<sup>1</sup> See *Norton v. S.*, 14 Tex. 387. *S. v. Malcolm*, 8 Clark, 413. *S. v. Hartigan*, 32 Verm. 607. *S. v. Swails*, 8 Ind. 524. *S. v. Neal*, 37 Me. 468. *King v. S.*, 21 Ga. 220. *Ogletree v. S.*, 28 Ala. 693. *S. v. M'Clure*, 25 Mo. 338. *Hopkinson v. P.*, 18 Ill. 264. *P. v. Davis*, 4 Parker, C. R. 61.

<sup>2</sup> With respect to the above statute and others immediately following, their applicability to the States of America is a question of some difficulty. Those which were passed before the foundation of American independence appear according to the general rule to have become common law,

and although inapplicable in a literal sense, yet are allowed to influence the decisions or judgments of the courts to some extent, but to what extent seems to be very doubtful. Thus it is obvious that striking in King's palaces or in churchyards, cannot be literally applied in America; but yet in conformity with the spirit of those statutes it should seem that assaults committed in public offices or in places of burial would be regarded as aggravated assaults. See *Bishop*, ii. s. 47, 48, citing *Kilty Rep. Stats.* 50-79.

performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute. (*h*)

Contempts against the *King's palaces* have always been looked upon as high misprisions; and, by the ancient law before the Conquest, fighting in the King's palaces, or before the King's judges, was punished with death. (*i*) The 33 Hen. 8, c. 12, provided severe punishment for all malicious strikings by which blood was shed within any of the King's palaces or houses, or any other house, at such time as the royal person happened to be there abiding; but these provisions were repealed by the 9 Geo. 4, c. 31, s. 1.

Striking in the King's superior courts of justice in Westminster-hall, or in any other place, while the courts are sitting, whether the Court of Chancery, Exchequer, King's Bench, or Common Pleas, or before justices of assize, or Oyer and Terminer, is made still more penal than even in the King's palace; perhaps for the reason that, those courts being anciently held in the King's palace, and before the King himself, striking there included the former contempt against the King's palace and something more, namely, the disturbance of public justice. (*j*) So that, though striking in the King's palace was not punished with the loss of the offender's hand, unless some blood were drawn, nor even then with the loss of lands and goods, the drawing of a weapon only upon a judge or justice in such courts, though the party strike not, is a great misprision, punishable by the loss of the right hand, perpetual imprisonment, and forfeiture of the party's lands during life, and of his goods and chattels. (*k*) And a party is liable to a similar punishment, if, in the same courts, and within their view, he strike a juror or any other person, either with a weapon, or with hand, shoulder, elbow, or foot; but he is not liable to such punishment if he make an assault only, and do not strike. (*l*) And one who is guilty of this offence cannot excuse himself by shewing that the person so struck by him gave the first offence. (*m*)

In one case, the three first counts of the information set forth a special commission for the trial of Arthur O'Connor and others for high treason; and that, pending the sessions, after the acquittal of O'Connor, and before any order or direction had been made by the Court for his discharge, the defendants, in open court, &c., made a great riot, and riotously attempted to rescue him out of the custody of the sheriff, to whose custody he had been assigned by the justices and commissioners; and, the better to effect such rescue and escape, did, at the said sessions, in open court, and in the presence of the said justices and commissioners, riotously, &c., make an assault on one J. R., beat, bruise, wound, and ill-treat the said J. R., and thereby impede and obstruct the said justices, &c. There were two other counts in the information; the one for riotously interrupting and obstructing the justices in the holding of the session, and the other for a common riot. (*n*) Two of the defendants having been found

(*h*) *Ante*, p. 652.

(*i*) 4 Blac. Com. 124.

(*j*) 3 Inst. 140. 4 Blac. Com. 125.

(*k*) Staundf. 38. 3 Inst. 140, 141. 1 Hawk. P. C. c. 21, s. 3. 4 Blac. Com. 125. 1 East, P. C. c. 8, s. 3, p. 408.

(*l*) Staundf. 38. 3 Inst. 140, 141. 1 Hawk. P. C. c. 21, s. 3. 4 Blac. Com. 125. 1 East, P. C. c. 12, s. 4.

(*m*) 1 Hawk. P. C. c. 12, s. 4.

(*n*) See the precedent of this information, 2 Chit. Crim. L. 208, *et seq.*



guilty generally, considerable doubt was intimated by Lord Kenyon, whether the Court were not bound to pass the judgment of amputation, &c., for the offence, as laid in the three first counts; and the matter stood over for consideration. But before the defendants were again brought up to receive judgment, the Attorney-General said, that he had received the royal command and warrant under the sign manual, whereby he was authorised to enter a *noli prosequi*, as to those parts of the information on which any doubt had arisen, or might arise, whether the judgment thereon were discretionary in the Court, and pray judgment only on such charges as left the judgment in their discretion; and, accordingly, a *noli prosequi* was entered on the three first counts; and on the others the Court gave judgment against the defendants, of fine, imprisonment, and sureties. (o)

A person who rescues a prisoner from any of the Courts which have been mentioned, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; for this offence is, in its nature, similar to the other; but as it differs in this, that no blow is actually given, the amputation of the hand is excused. (p) And for the like reason, an affray or riot near the said Courts, but out of their actual view, is punishable by fine and imprisonment during pleasure, but not with the loss of the hand. (q)

Though an assault in any of the King's inferior courts of justice would not subject the offender to lose his hand; (r) yet, upon an indictment for such an assault, the circumstances under which it was committed would, doubtless, be considered as a matter of great aggravation. And any affray or contemptuous behaviour in those courts, is punishable with a fine, by the judges there sitting. (s)

It is said that, in order to warrant the higher judgment, the offence must be charged to have been committed in the presence of the King, or of the justices. (t) And it seems also that in order to warrant such judgment, the indictment ought expressly to charge a stroke; though it does not appear whether any technical word would be necessary to be used for that purpose. (u)

Amongst the principal of those assaults, the aggravated nature of which may be said to arise from the great criminality of the object intended to be effected, is an assault upon a person with a felonious intent to commit a robbery, and nearly allied to this is a demand of property effected by menaces or force, and with the intent of

(o) *R. v. Lord Thanet and others*, B. R. Trin. 39 Geo. 3. 1 East, P. C. c. 8, s. 3, pp. 408, 409, 410. In *R. v. Davis*, Dy. 188 a, 188 b, and the notes thereto, are various instances of the judgment having been executed to the full extent. One of them is remarkable for the speedy justice which appears to have been administered. 'Richardson, Chief Justice of C. B., at the assizes at Salisbury, in the summer of 1631, was assaulted by a prisoner condemned there for felony, who, after his condemnation, threw a brickbat at the said judge, and which narrowly missed; and for this an indictment was immediately drawn by Noy against the prisoner, and his right

hand cut off and fixed to the gibbet upon which he was himself immediately hanged in the presence of the Court.'

(p) 1 Hawk. P. C. c. 21, s. 5. 4 Blac. Com. 125.

(q) 1 Hawk. P. C. c. 21, s. 6. 4 Blac. Com. 125. See vol. i. p. 587.

(r) 3 Inst. 141. 1 Hawk. P. C. c. 21, s. 10.

(s) 4 Blac. Com. 126. 1 Hawk. P. C. c. 21, s. 10.

(t) 1 East, P. C. c. 8, s. 3, p. 410. 1 Hawk. P. C. c. 21, s. 3.

(u) 1 East, P. C. c. 8, s. 3, p. 408, referring to 1 Sid. 211.

stealing such property. These offences are placed in the Chapter on Robbery, Vol. II.

The 11 & 12 Will. 3, c. 7, s. 9, enacts that, 'if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods, committed to his trust,' he shall be adjudged to be a pirate, felon, and robber; and being convicted, shall suffer death and loss of lands, goods, &c., as pirates, felons, and robbers upon the seas, ought to suffer. (*v*)

The provision relating to assaults upon clergymen and obstructing them in the performance of their duties has already been inserted. (*w*)

By the 24 & 25 Vict. c. 100, s. 37, 'Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorised, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable [at the discretion of the Court] (*x*) to be kept in penal servitude for any term not exceeding seven years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour].' (*y*)

Sec. 38. 'Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, (*z*) or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.' (*a*)

Sec. 39. 'Whosoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling, or otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use, any such violence or threat to any person having the care or charge of any

(*v*) See this statute more at large, vol. i. p. 261.

(*w*) Vol. i. p. 655.

(*x*) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (*g*).

(*y*) This clause is taken from the 9 Geo. 4, c. 31, s. 24, and 10 Geo. 4, c. 34, s. 30 (1.).

(*z*) Upon an indictment, under this section, for assaulting police officers in the execution of their duty, it was objected that there was no offence, as the police were in plain clothes, and the defendants did not know they were constables; but the objection was overruled by the Recorder,

who said that the offence was not assaulting them, knowing them to be in the execution of their duty, but assaulting them being in the execution of their duty. *R. v. Forbes*, 10 Cox, C. C. 362. Russell Gurney, Recorder.<sup>1</sup>

(*a*) This clause is taken from the 9 Geo. 4, c. 31, s. 25, and 10 Geo. 4, c. 34, s. 31 (1). This clause extends the former enactment to resisting and wilfully obstructing peace officers. Revenue officers were included in the former clause, but are omitted in this, because assaults on them are otherwise provided for. See vol. i. p. 277, *et seq.*

#### AMERICAN NOTE.

<sup>1</sup> Mr. Bishop suggests a doubt as to the correctness of this decision. In America, it seems that knowledge of the official charac-

ter of the person assaulted must be shown in such a case. Bishop, ii. s. 51.

wheat or other grain, flour, meal, malt, or potatoes, whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three months: Provided that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever.' (b)

Sec. 40. 'Whosoever shall unlawfully and with force hinder or prevent any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat or use any violence to any such person with intent to hinder or prevent him from working at or exercising the same, shall, on conviction thereof before two justices of peace, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three months: Provided that no person who shall be punished for any such offence by reason of this section shall be punished for the same offence by virtue of any other law whatsoever.' (c)

By the 1 & 2 Will. 4, c. 41, s. 1, two or more justices, upon information upon oath, that disturbances are likely to take place, may appoint special constables out of the householders, or other persons (not legally exempt from serving the office of constable,) residing in any parish, township, or place wherein disturbances are likely to occur, or in the neighbourhood thereof; and by sec. 5, every special constable so appointed, shall not only within the parish, township, or place for which he shall have been appointed, but also throughout the entire jurisdiction of the justices appointing him, have, exercise, and enjoy all such powers, authorities, advantages, and immunities, and be liable to all such duties and responsibilities as any constable duly appointed now has within his constablewick, by virtue of the common law of this realm, or of any statute or statutes.

A special constable, appointed under this Act, continues such, and has all the authority of an ordinary constable, until his services are either suspended or determined under sec. 9 of the Act, although eight years may have elapsed since his appointment. (d)

The 5 & 6 Will. 4, c. 43, s. 1, makes all persons, willing to act as special constables, capable of being appointed, although they may not be resident in the parish, township, or place, or in the neighbourhood thereof, and gives such persons all the same powers, &c., when

(b) This section assimilates part of the 9 Geo. 4, c. 31, s. 26, and part of the 14 & 15 Vict. c. 92, s. 2. It omits the word 'wound' in the former because a wounding with any of the intents specified in this clause would fall within sec. 20 of this Act; and it introduces 'threat of violence,' and the intent to compel the party to buy, sell, or dispose of any of the things specified. By sec. 76 of the Act all summary proceedings under this clause should be taken under the 11 & 12 Vict. c. 43,

where the offence is committed in England, except in London and the Metropolitan Police district, and in Ireland under the 14 & 15 Vict. c. 93.

(c) This clause is taken from the 9 Geo. 4, c. 31, s. 26. The summary proceedings under this clause should be taken in the same manner as under the preceding clause. See the last note.

(d) *R. v. Porter*, 9 C. & P. 778, Coleridge, J., *ante*, p. 71.

appointed, as the special constables appointed under the 1 & 2 Will. 4, c. 41.

The Rural Police Act, 2 & 3 Vict. c. 93, s. 8, enacts, that the chief constable, and other persons appointed under the Act, 'shall be sworn as constables before a justice of the county, and shall have all the powers, privileges, and duties throughout the county, and also in all liberties and franchises, and detached parts of other counties locally situate within such county, and also in any county adjoining to the county for which they are appointed, which any constable duly appointed has within his constablewick, by virtue of the common law, or of any statute made or to be made. (e) And the 3 & 4 Vict. c. 88, s. 16, which provides for the appointment of local constables for parishes, &c., gives such local constables similar powers, &c., but they are not bound to act beyond the parish, &c., for which they are appointed. (f)

The 5 & 6 Vict. c. 109, provides for the appointment and payment of parish constables, and by sec. 15, 'the said constables shall have within the whole county, and also within all liberties and franchises and detached parts of other counties situated therein, and also in every county adjoining to the county in which they are appointed, all the powers, privileges, and immunities, and shall be liable to all the duties and responsibilities of a constable within his constablewick, but shall not be bound to act beyond the parish for which they are severally appointed and sworn, without the special warrant of a justice of the peace.' (g)

The 10 & 11 Vict. c. 89, consolidates certain provisions usually contained in Acts for regulating the police of towns, and by sec. 8, 'any justice may swear in any person appointed and employed as a constable under this and the special Act, and the constables so sworn in shall have, within the limits of the special Act, and in any place not more than five miles beyond such limits, the like powers, privileges, and duties, and shall have the same indemnities and protection, and shall be subject to the like penalties and forfeitures, as any constable duly appointed has or is subject to within his constablewick by law.'

The 19 & 20 Vict. c. 69, contains provisions to render more effectual the police in counties and boroughs; and by sec. 6, 'the constables of every county appointed under the 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, or either of them, or this Act, shall have in every borough situate wholly or in part within such county, or within any county or part of a county in which they have authority, all the powers and privileges, and be liable to all such duties and responsibilities as the constables appointed for such borough have and are liable to within any such county, and shall obey all such

(e) This clause puts the constables appointed under the 2 & 3 Vict. c. 93, in the same position as parish constables. *R. v. Chelmsford*, 5 Q. B. 66.

(f) Many local acts also authorise the appointment of constables and watchmen, and give them the same powers as ordinary constables. See also the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, ss. 76 & 83.

(g) The proviso at the end of this section (which is not set out in the text) is repealed by the 37 & 38 Vict. c. 96. By 35 & 36 Vict. c. 91, parish constables are not to be appointed except when the quarter sessions deem it necessary. Sec. 7 of the Act defines the powers and duties of constables appointed under the Act.

lawful commands as they may from time to time receive from any of the justices of the peace having jurisdiction within any such borough in which they shall be called on to act as constables, for conducting themselves in the execution of their office.' (h)

As prosecutions for assaulting constables, and other peace officers, are by no means uncommon, it may be well to introduce in this place some of the authorities, which may be useful in such prosecutions. In the case of all justices of the peace, peace officers, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments, and that even in a case of murder, (i) and this rule extends to constables and watchmen appointed under local Acts. (j)

Constables, and other peace officers, are invested with large powers and extensive authority at common law, for the purpose of preserving the peace, preventing the commission of crimes and misdemeanors, apprehending offenders, and executing the warrants, of justices of the peace. Every high and petty constable, within the limits of his hundred and district, is a conservator of the peace at common law. (k) It is their duty, therefore, to do all that they can to preserve the peace within their respective constablewicks: and for this purpose, they not only may, but ought to, apprehend any person who shall make an affray or assault upon another in their presence, or who shall threaten to kill, beat or hurt another, or shall be ready to break the peace in their presence, and may take such persons before a justice of the peace, in order that they may find surety for the peace. (l) So also by the common law, the sheriff, under sheriff, constable, or any other peace officer may and ought to do all that in them lies towards the suppressing of a riot. (m) And in order the better to enable peace officers to preserve the peace, they have authority to command all other persons to assist them, in endeavouring to appease such disturbances as take place in their presence. (n)

In all cases of felony, a peace officer has not only authority to apprehend a felon while committing the felony, but also upon pursuit, or information at any time afterwards; (o) and he may even justify apprehending an innocent person, if he have reasonable ground to suspect that he is guilty of felony, and this although no felony have been committed. (p) In all cases of misdemeanor, a peace officer may apprehend the party while committing the offence; (q) and it should seem, upon fresh and immediate pursuit, in some instances. (r) But the general rule is, that if a misdemeanor be committed in the absence of a peace officer, he cannot afterwards

(h) But by the 22 & 23 Vict. c. 32, s. 2, county constables are not to be required to act in any borough.

(i) *Post, Evidence*, c. 3, s. 2. Gordon's case, 1 Leach. 515.

(j) *Butler v. Ford*, 1 C. & M. 662. 3 Tyrw. 677. See also *M'Gahey v. Alston*, 2 M. & W. 206.<sup>1</sup>

(k) *Dalt. c. 1.*

(l) *Dalt. c. 1*, and see vol. i. p. 590.

(m) Vol. i. p. 581.

(n) Vol. i. p. 582. *Dalt. c. 1.* See *R. v. Sherlock*, 35 L. J. M. C. 92.

(o) *Ante*, p. 75, *et seq.*

(p) *Beckwith v. Philby*, 6 B. & C. 638, *ante*, p. 83.

(q) *Ante*, pp. 82, 83, 85.

(r) *Ante*, pp. 75, 76.

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#### AMERICAN NOTE.

<sup>1</sup> See *Bishop*, i. s. 464 (5).

apprehend the party who committed it. (s) But a constable may arrest, if a witness to an affray gives one of the affrayers in charge to the constable on the spot where it was committed, and whilst there is a reasonable apprehension of its continuance. (u) So a constable may apprehend a person while attempting to commit a felony; (v) or, it should seem, even upon fresh pursuit, after he had desisted from the attempt. (w)

If an officer hear a disturbance in a public-house in the night, and the door be open, he may enter. (x) But he has no authority to turn any one out of a public-house, unless the party had committed some offence punishable by law. (y) Nor to prevent a guest from going into a room in such house, unless a breach of the peace was likely to occur. (z) But if a person makes such a disturbance in a public-house as is calculated to alarm the neighbourhood, a policeman may apprehend him. (a)

It is to be observed, that the authority of a constable, or other peace officer, to act without a warrant, is confined by the common law to the district for which he is an officer, and consequently he cannot legally act as an officer in any other district. (b)

The constable is the proper officer to the justice of the peace, and bound to execute his warrants; and, therefore, where a statute authorises a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to execute such warrant; (c) and inasmuch as the office of constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself. (d)

At common law, where a warrant was directed to officers as individuals, they might execute it anywhere within the extent of the magistrate's jurisdiction who granted it; but where it was directed to persons, by the name of their office, it was confined to the districts in which they were officers. (e) If, therefore, a warrant was directed to 'the constable of the parish of S.,' such constable had no authority at common law to execute it out of the parish of S.; and if he attempted so to do, he was a trespasser. (f) But now, by the 11 & 12 Vict. c. 42, s. 10, and c. 43, s. 3, a constable in such a case, may execute a warrant out of his precinct at any place within the jurisdiction of the magistrate who granted it. (g)

If a warrant be good upon the face of it, and for an offence within the jurisdiction of the justice, the falsity of the charge will not pre-

(s) *Ante*, p. 86, *et seq.*, and vol. i. p. 591.  
 (u) *Timothy v. Simpson*, 5 Tyrw. 244, vol. i. p. 591.  
 (v) *R. v. Hunt*, *ante*, p. 74.  
 (w) *R. v. Howarth*, *ante*, p. 80.  
 (x) *R. v. Smith*, 6 C. & P. 136, *Tindal*, C. J.  
 (y) *Wheeler v. Whiting*, 9 C. & P. 262, *ante*, p. 90.  
 (z) *R. v. Mabel*, 9 C. & P. 474, *ante*, p. 90. As to the rights of constables to enter public-houses under the Licensing Acts, see 35 & 36 Vict. c. 94, ss. 18, 25; and 37 & 38 Vict. c. 49, s. 16.  
 (a) *Howell v. Jackson*, 6 C. & P. 723, *ante*, p. 91.  
 (b) *Ante*, p. 94.  
 (c) 2 Hawk. P. C. c. 10, s. 35.  
 (d) 2 Hawk. P. C. c. 10, s. 36, and cases there cited.  
 (e) *Ante*, p. 94.  
 (f) *R. v. Weir*, 1 B. & C. 288, *ante*, p. 94.  
 (g) *Ante*, p. 94.

vent the execution of the warrant from being legal. (*h*) But if the warrant be bad upon the face of it, as if the name of the person on whom it is to be executed be insufficiently stated, or the name of the officer who is to execute it be inserted after the warrant is issued, the officer will not be justified in acting under it. (*i*) So a constable cannot justify an arrest by virtue of a warrant, which appears on the face of it to be for an offence whereof a justice of the peace has no jurisdiction, or to bring the party before him at a place out of the county for which he is a justice, (*j*) or by virtue of a blank warrant. (*k*) And so where a constable of the county of Worcester apprehended a man in the city of Worcester under a warrant issued by county justices and not backed by any justice for the city (which has a separate commission), and not after a pursuit out of the county, it was held that the warrant was bad. (*kk*) A constable in executing a warrant must act in strict conformity with the warrant, otherwise he is a trespasser. He cannot, therefore, justify apprehending Richard H., under a warrant to apprehend John H. (*l*) So in executing a search warrant, he cannot justify seizing any goods except the goods specified in the warrant, unless perhaps in a case where they would furnish evidence of the identity of the goods stolen. (*m*)

The right of officers to break open doors or windows in order to make an arrest has already been considered, (*n*) as has also the necessity of giving due notice of the officer's business, (*o*) and so have the cases of officers taking opposite sides in an affray. (*p*)

In all cases where officers are authorised to act, they must exercise their authority in a proper manner, and if they exceed the reasonable bounds of what is required for the due performance of their duties, they become wrong doers. Thus if a constable arrest a man upon suspicion of felony, he must take him as soon as he reasonably can before a magistrate for examination, and if he keep him in custody for an unreasonable time, as, for instance, three days, before he does so, he becomes a trespasser. (*q*) So a constable is bound to treat a prisoner, while in his custody, with no greater severity than is necessary to prevent his escape; if, therefore, he handcuff a prisoner where it is not necessary in order to prevent his escape, or where he has not attempted to escape, he is a trespasser. (*r*) With respect to handcuffing, the law undoubtedly is, that constables are not only justified, but are bound to take all reasonably requisite measures for preventing the escape of those persons they have in custody for the purpose of taking them before the magistrates; but what those reasonable measures are must depend entirely upon the circumstances, upon the temper and conduct of the person in custody, on the nature of the

(*h*) *Ante*, p. 97.

(*i*) *Ante*, p. 99, *et seq.*

(*j*) 2 Hawk. P. C. c. 13, s. 10. See the 11 & 12 Vict. c. 42, s. 6, and c. 43, s. 6, as to justices who act for two or more adjoining counties.

(*k*) *Ante*, p. 101, *et seq.*

(*kk*) *R. v. Campton*, 5 Q. B. D. 341.

(*l*) *Hoye v. Bush*, *ante*, p. 100.

(*m*) *Crozier v. Cundey*, 6 B. & C. 232.

See *Parton v. Williams*, 3 B. & Ald. 330. *Smith v. Wiltshire*, 2 B. & B. 619. *Theo-*

*bald v. Crichmore*, 1 B. & A. 227, and other cases decided on the 24 Geo. 2, c. 44, which protects officers executing warrants where they are strictly in obedience to the warrant, and where the justice still remains liable.

(*n*) *Ante*, p. 110, *et seq.*

(*o*) *Ante*, p. 104, *et seq.*

(*p*) *Ante*, p. 92.

(*q*) *Wright v. Court*, 4 B. & C. 596.

(*r*) *Ibid.*

charge, and a variety of other circumstances which must present themselves to the mind of any one. There is no general rule that every one conveyed before the magistrates is to be handcuffed, and any such rule is unjustifiable in law; and in every case of the kind, the question for the jury is whether, looking at all the circumstances of the case, the constable used reasonable precautions, or used unnecessary measures, to secure the safe custody of his prisoner. (s) With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reason of the violence of his language or conduct, that a constable may reasonably think it prudent and right to search him in order to ascertain whether he has any weapon with which he might do mischief to the person, or commit a breach of the peace; but no general rule can be applied to all such cases. Even when a man is confined for being drunk and disorderly, it is not always necessary that he should be searched, as the searching of such a person must depend upon all the circumstances of the case. (t) So although a constable may be justified in removing from church a person who attempts to read a notice in the church, and detaining him until the service is over, he cannot legally detain him afterwards in order to take him before a magistrate. (u)

The following cases have been decided as to assaults upon collectors of taxes and peace officers called in to assist them in the execution of their duties. In order to justify a distress for assessed taxes under the 43 Geo. 3, c. 99, s. 33, it is not necessary that there should have been a personal demand by the collector, or a personal refusal by the party distrained upon. Nor is it essential that the demand, to which the refusal applies, should have specified the precise amount claimed, if the debtor understood what the amount was, and did not object to it. If a count for assaulting a party in possession of goods distrained for assessed taxes states the sum for which they were distrained, and a different sum is proved, this is a fatal variance; but if a count mention no sum the defendant may be convicted, if the party be proved to have been lawfully in possession for any amount. Upon an indictment, the first count of which charged the defendants with assaulting J. S., then being in lawful possession of goods seized for £6 15s. 6d., arrears of assessed taxes, and the second count with a common assault, it appeared that the goods of one Ford had been distrained on his premises for taxes due from him, and J. S. had been left in possession. In order to shew that the taxes had been regularly demanded before putting in the distress, it was proved that the collector had gone to Ford's house on the 23rd of January, and Ford not being at home, had demanded the taxes of a female who was there, and said that he had called often before, and would distrain on the following day if they were not paid. The woman answered that Ford had been told before of the collector's coming for taxes, but said he could not pay; the collector left a message with the woman, requesting Ford to call on him, which Ford afterwards did, and stated that he was very poor and could not pay;

(s) *Leigh v. Cole*, 6 Cox, C. C. 329, Williams, J. See *R. v. Lockley*, 4 F. & F. 155.

(t) *Leigh v. Cole*, *supra*.

(u) *Williams v. Glenister*, 2 B. & C. 699, and see *Imason v. Cope*, *ante*, p. 314. *Levy v. Edwards*, 1 C. & P. 40, *ibid.*, and *Stocken v. Carter*, 4 C. & P. 477.



it was objected that this was not sufficient evidence of a demand and refusal within the terms of the 43 Geo. 3, c. 99, s. 33; but Lord Denman, C. J., held that it was not necessary to shew a refusal given by the householder himself, or to the collector personally; but that it was sufficient, if the circumstances shewed that the householder, from poverty or otherwise, would not pay, and if the party meeting with the refusal was one authorised to act for him: and he left it to the jury to say whether they were satisfied that there had been a refusal: his lordship also held that as the first count specified a particular amount of arrears, and a different one was proved, that count was not maintainable; but upon the second, which mentioned no sum, that there might be a verdict against the defendants, if the prosecutor was lawfully in possession for any amount: and upon a motion for a new trial the Court held that the motion should be refused: by the statute a distress is to be taken only if there shall have been a demand and refusal of the taxes, but nothing is said to apply that provision to particular individuals, or particular sums; it is sufficient if there has been a demand of the taxes, which the party has understood, and he has not objected to the amount, but has refused to pay. (*v*)

A collector of land-tax is not entitled, under the provisions of the 38 Geo. 3, c. 5, s. 17, or under his general authority, to take a constable with him into the house of a person from whom he is demanding payment of the arrears of land-tax. But if he has reasonable ground (from past or present circumstances) to apprehend violence from such person, he may call in constables to assist in keeping the peace, and such constables are justified in staying while the collector remains to be paid, as long as there is reason to expect violence, and if the owner of the house use violence to remove them, he is indictable for assaulting a peace officer in the execution of his duty. Such a collector has a general authority, under the Act, to distrain, and a special warrant is not necessary: and he need not have his warrant or the book of assessments with him at the time he distrains. Clark and Austen were indicted for assaulting Grinder, a peace officer, in the execution of his duty, and for a common assault. Tipper, a collector of land-tax, had applied on the 28th of October to Clark for arrears of land-tax due from him, which had been repeatedly demanded before; Clark said, 'I suppose if I do not pay it, you are going to distrain?' Tipper replied that he probably should. Clark answered, 'If you put your hand upon anything, I will split your skull.' Collins, a constable, was with Tipper on this occasion. On the 29th of November following, Tipper went to Clark's house, with Collins, Grinder, and a third constable: he desired the two last to remain outside, and to be on the alert, lest there should be a row; he and Collins entered a room, and again demanded the arrears; as soon as the demand was made Clark quitted the room, and directly afterwards he was heard to fasten the house door; upon this, Collins, by Tipper's order, unfastened the door, and brought in Grinder and the other constable. Clark soon afterwards returned into the room, with bank notes in his hand, accompanied by ten or twelve men, among whom was Austen. Clark asked what Grinder did there;

and Collins answered that Grinder was there to aid and assist if required: upon this Clark said, 'I will not pay the taxes till the thief-catcher has left the room.' Grinder refused to depart, upon which Clark desired Austen to put him out, saying that he would be answerable; Austen then attempted to force Grinder out of the room, and, in so doing, committed the assault in question. Clark afterwards paid the taxes with the notes in his hand. It was left to the jury to say, whether Tipper introduced Grinder for the purpose of keeping the peace, and if they thought he did so, they were directed to find a verdict of guilty; the jury found in the affirmative of the question left, and convicted both defendants. Upon a motion for a new trial, it was contended that the collector had no right to take a constable with him; that it ought to have been shewn that the collector had a warrant to distrain, or the book of assessments with him; but it was held that it was not necessary that the collector should have either the warrant or the book of assessments with him; and although the statute was applicable only to cases where a house or chest was to be broken open, and therefore the collector had no right to take Collins or any other person with him for the purpose of demanding the money; yet as the collector had good ground, from what had passed at that time and on the previous occasion, to apprehend violence, he was perfectly justified in introducing Grinder and the other constable to keep the peace, and that Grinder was justified in remaining to prevent violence, and consequently was assaulted whilst in the execution of his duty. And although the collector had no right to take Collins into the house on either occasion, yet, as no objection was made to his presence, it did not vary the case. (w)

It seems to be settled, that an arrest unlawfully made by a constable, without a warrant, cannot be made good by a warrant taken out afterwards. (x) Also it has been held, that if a constable, after he has arrested a party by force of a warrant, suffer him to go at large, upon his promise to return at such a time, and find sureties, he cannot afterwards arrest him again by virtue of the same warrant. (y) However, if the party return, and put himself again under the custody of the constable, it seems that it may probably be argued that the constable may lawfully detain him, and bring him before a justice in pursuance of the warrant. (z)

A count for assaulting A., in the execution of his office, imprisoning him, and preventing him from arresting a person, as he was commanded, by a writ issued by the Court of Record of a town and county, merely described A. as 'one of the sergeants-at-mace of the said town and county,' and the judgment was arrested, because it did not appear that A. was a legal officer of the Court out of which the writ issued; for a sergeant-at-mace, *ex vi termini*, means no more than a person who carried a mace for somebody, and the indictment did not shew for whom; and taking the whole count together, the jury, in effect, had found that there was an assault and imprisonment, but committed under circumstances which justified the de-

(w) R. v. Clark, 3 Ad. &amp; E. 287.

(x) 2 Hawk. P. C. c. 13, s. 9.

(y) 2 Hawk. P. C. ibid.

(z) 2 Hawk. P. C. ibid.

fendant, and therefore there was not sufficient to sustain the judgment, as for a common assault, or for an imprisonment. (a)

The 7 & 8 Geo. 4, c. 53, (b) an Act to consolidate the laws relating to the management and collection of the excise, by sec. 40 enacts, 'That if any person, armed with any offensive weapon whatsoever, shall with force or violence assault or resist any officer of excise, or any person employed in the revenue or excise, or any person acting in the aid or assistance of such officer or person so employed, who, in the execution of his office or duty, shall search for, take, or seize, or shall endeavour or offer to search for, take, or seize, any goods or commodities forfeited under or by virtue of this Act, or any other Act or Acts of Parliament, relating to the revenue of excise or customs, or who shall search for, take, or seize, or shall endeavour or offer to search for, take, or seize any vessel, boat, cart, carriage, or other conveyance, or any horse, cattle, or other thing used in the removal of any such goods or commodities, or who shall arrest, or endeavour or offer to arrest, any person carrying, removing, or concealing the same, or employed or concerned therein, and liable to such arrest, then and in every such case, it shall be lawful for every such officer and person so employed, and person acting in such aid and assistance as aforesaid, who shall be so assaulted or resisted, to oppose force to force, and by the same means and methods by which he is so assaulted or resisted, or by any other means or methods, to oppose such force and violence, and to execute his office or duty, and if any person so assaulting or resisting such officer as aforesaid, or any person so employed, or any person acting in such aid and assistance as aforesaid, shall in so doing be wounded, maimed, or killed, and the said officer or person so employed, or person acting in such aid and assistance as aforesaid, shall be sued or prosecuted for any such wounding, maiming, or killing, it shall be lawful for every such officer, or person so employed, or person acting in such aid and assistance, to plead the general issue, and give this act and the special matter in evidence in his defence; and it shall be lawful for any justice or justices of the peace, or other magistrate or magistrates before whom any such officer or person so employed, or person acting in such aid and assistance as aforesaid, shall be brought for, or on account of, any such wounding, maiming, or killing as aforesaid, and every such justice of the peace and magistrate is hereby directed and required to admit to bail every such officer, and every person so employed, and every person acting in such aid and assistance as aforesaid, any law, usage, or custom to the contrary thereof in anywise notwithstanding.' (c)

(a) *R. v. Osmer*, 5 East, 304, vol. i. p. 881. There does not appear to have been any count for a common assault in this indictment. C. S. G.

(b) See also 24 & 25 Vict. c. 100, s. 38, ante, p. 324. By 16 & 17 Vict. c. 107, s. 251, 'If any person shall, by force or violence, assault, resist, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person duly employed for

the prevention of smuggling, in the due execution of his or their duty, or any person acting in his or their aid, every person so offending, being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and be kept to hard labour, for any term not exceeding three years, at the discretion of the Court before whom such offender shall be tried and convicted as aforesaid.'

(c) By sec. 41, persons against whom in

By sec. 43, for the better and more impartial trial of any indictment or information for any such violent assault as aforesaid, 'every such offence shall and may be inquired of, examined, tried, and determined in any county in England, if such offence shall have been committed in England or in any of the islands thereof, or in any county in Scotland, if the same shall have been committed in Scotland or in any of the islands thereof, or in any county in Ireland, if the same shall have been committed in Ireland or in any of the islands thereof, in such manner and form as if the same offence had been committed in such county respectively; (d) and that whenever any person shall be convicted of any such violent assault or resistance as aforesaid, it shall be lawful for the Court before which any such offender shall be convicted, or which by law is authorised to pass sentence upon any such offender, to award and order (if such Court shall think fit) sentence of imprisonment, with hard labour, for any term not exceeding the term of three years, either in addition to, or in lieu of, any other punishment or penalty which may by law be inflicted or imposed upon any such offender, and every such offender shall thereupon suffer such sentence in such place, and for such term as aforesaid, as such Court shall think fit to direct.' (e)

By the 13 & 14 Vict. c. 101, s. 9, 'Where any person shall be charged with and convicted of any assault upon any officer of a workhouse or relieving officer in the due execution of his duty, or upon any person acting in aid of such officer, the Court may sentence the offender to the same punishment as is provided by law for an assault upon a peace officer or revenue officer in the due execution of his duty, and shall have the same power as in cases of such last-mentioned assault to order payment of the costs and expenses of the prosecution.' And by the 14 & 15 Vict. c. 105, s. 18, the preceding clause is extended to 'an assault upon any person included under the word "officer" in the 4 & 5 Will. 4, c. 76, or upon any other person acting in his aid;' and by sec. 109 of the last-mentioned Act, the term 'officer' includes 'any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant overseer, governor, master or mistress of a workhouse, or any other person who shall be employed in any parish or union in carrying this Act or the laws for the relief of the poor into execution, and whether performing one or more of the above-mentioned functions.'

We have seen that by the 14 & 15 Vict. c. 19, s. 11, (f) any person whatsoever may apprehend any person who shall be found

dictments or informations have been found or filed for such assaults, are to be bound with two sureties to answer the same, and in default to be committed: by sec. 42, if any offender be in prison for want of bail, a copy of the indictment or information may be delivered to the gaoler with a notice of trial and proceedings had thereon.

(d) This provision would probably be held to extend only to assaults upon officers when in the execution of their duty. If, therefore, upon an indictment containing counts for assaulting an officer in the execu-

tion of his duty, and for a common assault, the jury were to acquit on all the counts except on that for the common assault, the judgment would be arrested if the venue were laid in any county except that in which the assault was committed. *R. v. Cartwright*, 4 T. R. 490, vol. i. p. 290.

(e) Some of the provisions of this Act are repealed by the 4 & 5 Will. 4, c. 51, and the 4 & 5 Vict. c. 20, but not the provisions above set forth. C. S. G.

(f) Vol. i. p. 952.

committing any indictable offence in the night, and may convey or deliver him to any constable or peace officer in order to his being conveyed, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law; and by sec. 12, 'If any person liable to be apprehended under the provisions of this Act, shall assault or offer any violence to any person by law authorised to apprehend or detain him, or to any person acting in his aid or assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years.'

By the 24 & 25 Vict. c. 100, s. 66, 'Any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall suspect of having committed, or being about to commit, any felony in this Act mentioned, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.' (g)

If any person were to assault, obstruct, or resist any constable or peace officer whilst apprehending any other person under the preceding section, the person so offending would be punishable under sec. 38. (h)

By the 34 & 35 Vict. c. 112 (the Prevention of Crimes Act, 1871), s. 12, Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the Court, be liable either to pay a penalty not exceeding twenty pounds, and in default of payment to be imprisoned with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months with or without hard labour. (i).

(g) This clause is taken from the 9 & 10 Vict. c. 25, ss. 13 and 14, and extended to all the felonies under this Act.

(h) *Ante*, p. 324.

(i) By the 48 & 49 Vict. c. 75, 'the provisions of sec. 12 of 34 & 35 Vict. c. 112, shall apply to all cases of resisting or wilfully obstructing any constable or peace officer

when in the execution of his duty, Provided that in cases to which the 34 & 35 Vict. c. 112, s. 12, is extended by this Act the person convicted shall not be liable to a greater penalty than £5, or in default of payment to be imprisoned with or without hard labour for a longer term than two months.'

## CHAPTER THE ELEVENTH.

### OF MAIMING, &C. BY THE FURIOUS DRIVING, &C. OF COACHMEN.

By the 24 & 25 Vict, c. 100, s. 35, 'Whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.' (a)

(a) This clause is taken from the 1 Geo. 4, c. 4, which was confined to stage-coaches and public carriages, and to the wanton and furious driving or racing, or wilful misconduct of coachmen and others having the charge of such coaches or carriages. The present section includes all carriages and vehicles, and extends also to wilful neglect.

As to the meaning of the term 'wilful,' see *post*, p. 343. Probably a bicycle would now be held to be a carriage within this section. *Taylor v. Goodwin*, 4 Q. B. D. 228. As to furious riding or driving in the metropolis, see 2 & 3 Vict. c. 47, s. 54 (5); by licensed drivers, 6 & 7 Vict. c. 86, s. 28; and in towns generally, 10 & 11 Vict. c. 89, s. 28.

## CHAPTER THE TWELFTH.

### OF SETTING SPRING GUNS, &c.<sup>1</sup>

By the 24 & 25 Vict. c. 100, s. 31, ' Whosoever shall set or place, or cause to be set or placed, any spring gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be liable [at the discretion of the Court] (a) to be kept in penal servitude [for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour]; and whosoever shall knowingly and wilfully permit any such spring gun, man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person, to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: Provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: Provided also, that nothing in this section shall be deemed to make it unlawful to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house, for the protection thereof.' (b)

The setting dog-spears in a wood is not an illegal act at common law, and it was not rendered so by the 7 & 8 Geo. 4, c. 18. (c)

(a) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (g).

(b) This clause is framed from the 7 & 8 Geo. 4, c. 18, with some slight verbal alterations.

(c) *Jordin v. Crump*, 8 M. & W. 782. See *Wootton v. Dawkins*, 2 C. B. N. S. 412. As to placing poisoned flesh in a garden, see *Daniel v. Janes*, 2 C. P. D. 351, vol. ii. p. 928.

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#### AMERICAN NOTE.

<sup>1</sup> In Alabama, the right to set spring guns is limited to the defence of the dwelling house. See *Simpson v. S.*, 59 Ala. 1;

31 Am. R. 1. See as to shops, *S. v. Moore*, 31 Conn. 479; 83 Am. D. 159.

## CHAPTER THE THIRTEENTH.

### OF OFFENCES RELATING TO RAILWAYS AND RAILWAY TRAINS.<sup>1</sup>

ALTHOUGH, perhaps, it may be departing from a strictly accurate distribution of offences to collect the clauses creating offences relating to railways and railway trains in one chapter, yet, as such a course appears to be likely to be of more practical utility, it has been adopted.

By the 3 & 4 Vict. c. 97, (a) general provisions are made for the regulation of railways, and by sec. 13, 'It shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine driver, guard, porter, or other servant in the employ of such company who shall be found drunk while employed upon the railway, or commit any offence against any of the byelaws, rules or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains shall be or might be obstructed or impeded, and to convey such engine driver, guard, porter, or other servant so offending, or any person counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this Act; and every such person so offending, and every person counselling, aiding, or assisting therein as aforesaid, shall, when convicted before such justice as aforesaid (who is hereby authorised and required, upon complaint to him made, upon oath, without information in writing, to take cognisance thereof, and to act summarily in the premises), in the discretion of such justice, be imprisoned, with or without hard labour, for any term not exceeding two calendar months, or, in the

(a) By the 34 & 35 Vict. c. 78, s. 17, rates, and charges, secs. 7 to 9 both inclusive, secs. 13, 14, 16 to 19, both inclusive, secs. 3 and 4 as relates to a table of tolls, and 21.

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#### AMERICAN NOTE.

<sup>1</sup> In America, there are statutes under which a railway company can be indicted for negligent management whereby the death of a passenger is caused. See Bishop, i. s. 531 (5).



like discretion of such justice, shall for every such offence forfeit to Her Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labour as aforesaid, for such period, not exceeding two calendar months, as such justice shall appoint; such commitment to be determined on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing Court of Quarter Sessions in the usual manner.'

Sec. 14. 'Provided always, and be it enacted, that (if upon the hearing of any such complaint he shall think fit) it shall be lawful for such justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons charged with such offence for trial for the same at the Quarter Sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of Her Majesty's gaols or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending, and convicted before such Court of Quarter Sessions as aforesaid (which said Court is hereby required to take cognisance of and hear and determine such complaint), shall be liable, in the discretion of such Court, to be imprisoned, with or without hard labour, for any term not exceeding two years.'

Sec. 21. 'Wherever the word "railway" is used in this Act it shall be construed to extend to all railways constructed under the powers of any Act of Parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam or by any other mechanical power; and wherever the word "company" is used in this Act it shall be construed to extend to and include the proprietors for the time being of any such railway, whether a body corporate or individuals, and their lessees, executors, administrators, and assigns, unless the subject or context be repugnant to such construction.'

By the 24 & 25 Vict. c. 100, s. 32, 'Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously, turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or shew, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (b) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour], and if a male under the age of sixteen years, with or without whipping.' (c)

(b) The words in brackets are repealed, but the punishment remains the same. See ante, p. 204, note (g).

(c) This clause is taken from the 14 & 15 Vict. c. 19, s. 6, and the word 'unlawfully' is substituted for 'wilfully' throughout.

Sec. 33. 'Whosoever shall *unlawfully* and maliciously throw, or cause to fall or strike, *at, against, into, or upon* any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, *or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part*, shall be guilty of felony and being convicted thereof shall be liable [at the discretion of the Court] (*cc*) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour].' (*d*)

Sec. 34. 'Whosoever, by any unlawful act, (*e*) or by any wilful omission or neglect, shall endanger, or cause to be endangered, the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.' (*f*)

By the 24 & 25 Vict. c. 97, s. 35, 'Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or

(*cc*) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (*g*).

(*d*) This clause is taken from the 14 & 15 Vict. c. 19, s. 7. The word 'unlawfully' is substituted for 'wilfully.' The introduction of the word 'at' extends this clause to cases where the missile fails to strike any engine or carriage. The other words in *italics* were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person in another carriage in the same train, and similar cases. In *R. v. Court*, 6 Cox, C. C. 202, the prisoner was indicted for throwing a stone against a tender with intent to endanger the safety of persons on the tender, and it appeared that the stone fell on the tender, but there was no person on it at the time, and it was held that the section was limited to something thrown upon an engine or carriage having some person therein, and consequently that no offence within the statute was proved, but this case would clearly come within this clause. As to punishing juvenile offenders in a summary manner, see 34 & 35 Vict. c. 78, s. 13.

(*e*) Two boys went upon premises of a railway company and began playing with a heavy cart which was near the line. Being started by the boys, the cart ran down an embankment by its own impetus. One boy tried to divert its course; the other cried to

him 'Let it go.' The cart ran on until it passed through a hedge and a fence of posts and rails and over a ditch to the railway, and it rested so close to the railway lines, as to obstruct any carriage passing upon them. The boys did not attempt to remove it. It was held, that as the first act of removing the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was, that the cart ran through the hedge, and so on to the railway, the boys might be properly convicted under the 24 & 25 Vict. c. 100, s. 34. *R. v. Monaghan*, 11 Cox, C. C. 608, per Pigott, B. The defendant with a cart arrived at the gates of a level crossing, and having twice shouted for the gate-man, who was in a hut close by, without receiving any answer, opened the gates himself and crossed the line. A passing train collided with the cart and sustained injury. He was indicted under sec. 36 of 24 & 25 Vict. c. 97, and sec. 34 of 24 & 25 Vict. c. 100, but the jury acquitted him, holding the gate-man to blame. *R. v. Strange*, 16 Cox, C. C. 552.

(*f*) This clause is taken from the 3 & 4 Vict. c. 97, s. 15, the words of which were, any person who 'shall wilfully do, or cause to be done, anything in such a manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same.' The present clause extends to any unlawful act and any wilful omission or neglect.

shew, hide or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (g) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour], and, if a male under the age of sixteen, with or without whipping.' (h)

Sec. 36. 'Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed (i) any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.' (j)

Upon an indictment on the 3 & 4 Vict. c. 97, s. 15 (now repealed), it appeared that the railway was constructed under an Act of Par-

(g) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (g).

(h) This clause is taken from the 14 & 15 Vict. c. 19, s. 6, and 'unlawfully' is substituted for 'wilfully' throughout. As to principals in the second degree, and accessories, see *ante*, p. 185.

(i) Where a drunken man got upon a railway and altered the signals, in consequence of which a luggage train shut off steam, and was brought 'very near to a stand,' it was held there was an 'obstruction' within the 24 & 25 Vict. c. 97, s. 36. *R. v. Hadfield*, L. R. 1 C. C. R. 253; 39 L. J. M. C. 131; 11 Cox, C. C. R. 574. (*Martin, B. dissentiente*). The defendant placed himself on the space between two lines of railways, at a spot between two stations, and held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations, and the driver of a goods train, acting upon the supposition that he was signalled by an inspector to slacken speed, shut off steam, and reduced his speed from twenty miles an hour to four miles an hour, and the defendant by this means was enabled to jump into the guard's van, and thereupon the train resumed its natural speed, and without stopping proceed onward: Held, that the defendant had unlawfully obstructed the train within the meaning of the above section of the said statute. *R. v. Hardy*, 40 L. J. M. C. 62; L. R. 1 C. C. R. 278, *et per* Bovill, C. J. 'Upon the facts stated in this case there can be no doubt but that the defendant made a signal by holding up his arms in the mode used by inspectors of the line. He thereby made a signal to the driver of the train with the intention of inducing him to reduce the speed of his train, and the driver did so in consequence; so there can be no doubt but that he in one sense obstructed the train; but the question

is raised whether sec. 36 of 24 & 25 Vict. c. 97 did not contemplate a physical obstruction. If the words used had been "whosoever shall obstruct the line of railway," there might have been ground for that contention, but those are not the words used. Sec. 36 enacts that, "whoever by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway," &c. That section refers to acts of wilful omission or neglect, which shews that acts of physical obstruction of the line were not alone contemplated. That section seems rather to point to acts of servants which might effect the stoppage of the carriages of a train. But all doubt is removed by reference to sec. 35, which provides against the maliciously doing certain acts which are enumerated to be placing objects upon the railway, removing part of a line, turning the points, and "making or shewing, hiding or removing, any signal, &c.," and "any other matter or thing" with intent to obstruct. The acts there enumerated are clearly not matters necessarily of physical obstruction. The acts contemplated by sec. 36 must be taken to be *eiusdem generis* with those in sec. 35; and the same construction must be put on both sections. "Any unlawful act" in sec. 36 includes the acts mentioned in sec. 35, therefore on that point this case is clear, and *R. v. Hadfield* was decided on the same principle. In that case, however, there was an alteration made of an actual fixed signal belonging to the line; but the words of this indictment following the statute are "by making a signal," which the defendant undoubtedly did, and therefore is within the statute. The two cases are not distinguishable.'

(j) This clause is taken from the 3 & 4 Vict. c. 97, s. 15. See note (f) *supra*.

liament, and was intended for the conveyance of passengers in carriages drawn by steam, but at the time of the offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and workmen. A railway truck was placed by the prisoners across the railway so as to obstruct the passage of any carriage and endanger the safety of persons conveyed therein, but its position was discovered, and it was removed before any collision occurred; it was objected that the case was not within the statute — 1st, because the railway was not used for the conveyance of passengers for hire; 2ndly, because no actual obstruction took place; but, upon a case reserved, it was held that the case was within the statute. It must be assumed that the railway was completed, and that all that required to be done was to open it for the public traffic. The prisoners did put an obstruction on the line, and they put it in such a position as to endanger the safety of the persons conveyed. The case therefore came within both branches of the section; there was an obstruction put on the line, and it was put so as to endanger the safety of the persons conveyed. It was contended that there could be no obstruction until some train were absolutely obstructed; but such a construction could not be maintained. The object of the legislature was obviously to prevent any disaster to those using the railway, and to punish those who put obstructions in such a manner as was likely to cause such disaster. The case was, therefore, within the intention of the statute; and though, in the ordinary course of things, it would generally be after the railway was fully opened that the public required to be protected, yet an obstruction before that time was within the mischief as well as the words of the statute. (*m*)

On an indictment on the 3 & 4 Vict. c. 97, s. 15 (now repealed), for throwing a stone upon a railway in such a manner as thereby to endanger the safety of one G. C. and of divers other persons being conveyed on the engines and carriages then using the railway, it appeared that the defendant was on a bridge over the railway, and let drop a stone on a train that was passing; the stone was a thin flat stone, about twice the thickness of a biscuit; and the train was travelling at the rate of about fifteen miles an hour. The railway was opened in January, 1845, but no Act of Parliament was obtained until the July following. It was objected on the interpretation clause, sec. 21, (*n*) that this railway was not constructed under an Act of Parliament; but Alderson, B., held that the effect of that clause was to extend and not to weaken the effect of sec. 15. (*o*) And his Lordship told the jury, 'there are two propositions for you to consider:—First, did the defendant wilfully cast or drop this stone on the railway? and secondly, did the casting that stone on the railway in the manner in which it was cast endanger the safety of any of the persons travelling on the railway at that time? If you are satisfied on both these points, he is guilty. If the defendant had this stone in his hand at the time when the train was passing,

(*m*) *R. v. Bradford*, Bell, C. C. 268.

(*n*) *Ante*, p. 339.

(*o*) *Ante*, p. 340, note (*f*). Alderson, B., said it would have been wiser if a count

had been inserted at common law for throwing a stone at a railway carriage, which is an offence at common law.

and it dropped accidentally from his hand on the railway, you should acquit him; for that which occurs by accident cannot be said to be wilful. Should you think that the defendant did cast the stone on the railway wilfully, the next question is, was it cast there by him under such circumstances as to endanger the safety of G. C., the guard, the engineer, or any of the passengers or persons in the carriages? Now that would depend very much on the rate at which the train was proceeding at the time, and the weight and the size of the stone dropped. The former is material, because it is the same thing whether I throw a stone at your head or you run your head against the stone. If, therefore, the train were coming along at the rate of fifteen miles an hour, it would strike with that velocity a stone that meets it. You might drop a stone on a broad-wheeled waggon without doing any harm; but it may be very different when you drop it on a machine going at an enormous rate. Suppose a passenger in this train, going at the rate of fifteen miles an hour, had put his head out of the window, or the guard were to do so, which his duty might render necessary, a blow from a stone of this size and weight certainly might endanger his safety.' The jury found that the defendant foolishly dropped the stone on the railway, but not with the intention of doing any injury; Alderson, B.: 'The intention of the prisoner in dropping the stone is not the question. It is, "did he purposely drop the stone on the railway, and would the effect of the stone's being so dropped be to endanger the safety of the persons on the railway."' (p)

Where on an indictment under the 3 & 4 Vict. c. 97, s. 15 (now repealed), it appeared that large quantities of earth and rubbish were found placed across the railway, and the prosecutor's case was that this had been done by the defendant wilfully and in order to obstruct the use of the railway; and the defendant's case was, that the earth and rubbish had been accidentally dropped on the railway; Maule, J., told the jury, that if the rubbish had been dropped on the rails by mere accident, the defendant was not guilty; but 'it was by no means necessary, in order to bring the case within this Act, that the defendant should have thrown the rubbish on the rails expressly with the view to upset the train of carriages. If the defendant designedly placed these substances, having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act.' And on the jury asking 'what was the meaning of the term "*wilfully*" used in the statute?' the learned judge added, 'he should consider the act to have been *wilfully* done, if the defendant intentionally placed the rubbish on the line, knowing that it was a substance likely to produce an obstruction; if, for instance, he had done so in order to throw upon the company's officers the necessary trouble of removing the rubbish.' (q)

In a case upon the 3 & 4 Vict. c. 97, s. 15, it was strongly intimated that the neglect of a driver and stoker of an engine to keep a good look-out for signals, according to the rules of the railway company, whereby a collision occurred, and the safety of the passen-

(p) R. v. Bowray, 10 Jurist, 211.

(q) R. v. Holroyd, 2 M. & Rob. 339. See Roberts v. Preston, 9 C. B. (N. S.), 208.

gers endangered, was not an offence within the 15th section of this Act. (r)

On an indictment under the 14 & 15 Vict. c. 19, s. 6, for maliciously placing a stone upon a railway with intent to obstruct the carriages travelling thereon, it appeared that the prisoners, two boys, were seen to go upon the railway, and whilst one held the lever by which the points were turned, so as to separate two portions of the rails, the other dropped a stone between them, so as to keep them separated; the result would have been, had the act not been detected, that the carriages would have been thrown off the rail. No motive was suggested except that of wanton mischief. The jury were told that it was not necessary that the prisoners should have entertained any feeling of malice against the railway company, or against any person travelling upon it; it was quite enough to support the charge if the act was done mischievously and with a view to cause an obstruction of a train. (s)

The prisoner was indicted on the 14 & 15 Vict. c. 19, ss. 6, 7, for maliciously throwing a torch at a railway truck with intent in one count to injure it, in another to endanger the safety of persons travelling in the truck; there was, however, no one on the truck, upon which the prisoner let the torch fall; and Channell, B., held that there was no evidence to support the second count. (t)

On an indictment on the 14 & 15 Vict. c. 19, s. 7, for maliciously throwing a stone into a railway carriage with intent to endanger the safety of any person in it, it appeared that there had been considerable popular excitement against a person who was about to travel by the train, and there was a crowd assembled at the time of its departure, and the prisoner had thrown a stone intending to hit him, but without any previous ill-will. It was urged that the statute did not apply; its object was to protect passengers by railways, and not to afford any additional protection against common assaults. Erle, J., after consulting Williams, J., said: 'Looking at the preamble of the sections relating to this class of offences, which recites that it is "expedient to make further provision for the punishment of aggravated assaults," and looking also to the provision of these clauses as indicated by the terms of sec. 6, immediately preceding the section upon which this indictment is framed, I consider that the "intent to endanger the safety of any person" travelling on the railway, spoken of in both sections, must appear to have been an intent to inflict some grievous bodily harm, and such as would sustain an indictment for assaulting or wounding a person with intent to do some grievous bodily harm; but as that is a question of degree,

(r) *R. v. Pardenton*, 6 Cox, C. C. 247. Cresswell and Williams, JJ. But the words of that section were, 'every person who shall wilfully do, or cause to be done, any thing, &c.' See note (f), *ante*, p. 340.

(s) *R. v. Upton*, Greaves' Campb. Acts, 92. 5 Cox, C. C. 298, Wightman, J.

(t) *R. v. Sanderson*, 1 F. & F. 37. See *R. v. Court*, *ante*, p. 340, note (d). It is reported to have been objected that the words 'matter or thing' were *ejusdem generis* with the other words employed, and

did not include the case of a combustible, which could only injure a truck by means of fire; for otherwise the 8th section would be nugatory, and that section requires proof of an intent to destroy the carriage by fire. Now, this is an error, for sec. 8 has nothing to do with railway carriages, but only with railway buildings, and it is quite clear that secs. 6, 7, include everything whatsoever that is used with any of the intents therein mentioned.

which it is impossible to define further than in those terms, it must be a question for the jury, upon the facts, whether there has been such an intent ;' and his Lordship directed the jury, that 'in order to convict the prisoner they must be satisfied that he intended to inflict on the person at whom he aimed some grievous bodily harm.' (u)

Where on a trial for assault at the Central Criminal Court, it appeared that the prosecutrix and the defendant left Brighton together by a train which ran to the New Cross station, which is within the jurisdiction of the Central Criminal Court; and the assault was committed between Brighton and the Three Bridges station, in the County of Sussex, and the prosecutrix there left the carriage in which she had been previously riding with the defendant, and travelled in another carriage to New Cross; it was held that by the combined operation of the 7 Geo. 4, c. 64, s. 13, and the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 2, the case might be tried at the Central Criminal Court. There was but one journey, and although the carriages were distinct, they all formed but one conveyance, and the fact that the prosecutrix and defendant rode in different carriages after the assault did not affect the question; it was the same as if they had occupied different parts of the same carriage. The words 'through which any carriage shall have passed' in the 7 Geo. 4, c. 64, refer to the time of the trial, and not to a time antecedent to the commitment of the offence, and therefore make the offence triable at any place within the limits of the beginning and end of the journey, and do not confine the trial to any county through which the train had passed up to the time of the offence. (v)

(u) *R. v. Rooke*, 1 F. & F. 107. This case does not appear to have been argued on the part of the Crown, and, with all deference to the very learned judges, it clearly proceeded on a mistake. The 14 & 15 Vict. c. 19, contains a number of enactments which have no bearing whatever on each other; the Act was framed to provide for totally different matters, which at that time called for a remedy for each. Secs. 1 and 2 relate to persons found by night with intent to commit felonies. Sec. 3 relates to administering chloroform. Secs. 4 and 5 relate to aggravated assaults. Then secs. 6, 7 and 8 are railway clauses, and it is perfectly clear that, although a person who commits an offence within either sec. 6 or sec. 7, may commit an assault, it is not essential to prove an assault in any offence contained in them, and no indictment upon them ever does allege an assault. They were most carefully framed for the very purpose of including every case where there was an 'intent to injure or endanger the safety of any person;' and those words were selected as much more general than with intent to

do grievous bodily harm. It is also a fallacy to suppose that, even if the sections were to be construed together, sec. 4 warrants this decision; for though one branch of it is 'inflict any grievous bodily harm,' the other is 'cut, stab, or wound' without any aggravation; so that a wound, however slight, and given without any intention to inflict grievous bodily harm, is within the section. Every indictment must allege the intent to be to injure or endanger the safety of some person, and it is very confidently submitted that the only proper question to be left to the jury in every case is, did the defendant do the act with intent to injure or endanger the safety of that person? C. S. G.

(v) *R. v. French*, 8 Cox, C. C. 252. The Recorder. Sussex was assumed to be out of the jurisdiction of the Central Criminal Court. It was also objected that the 7 Geo. 4, c. 64, did not apply to railway trains, because they were not contemplated when that Act passed, and they did not come within the terms of the Act, this objection seems to have been tacitly overruled.

## CHAPTER THE FOURTEENTH.

### OF THREATS AND THREATENING LETTERS.<sup>1</sup>

**Threats at common law.** — It is said, that the dispersing of *bills of menace* threatening destruction to the lives or properties of those to whom they were addressed, for the purpose of extorting money, is, at common law, a high misdemeanor, punishable by fine and imprisonment. (a) Threats directed against persons immediately under the protection of a court are offences punishable by fine and imprisonment, as if a man threaten his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in his custody, and properly executing his duty. (b) And a precedent is given of an indictment at common law against the attorney of a plaintiff in a cause for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury unless the defendant gave up the benefit of the verdict. (c)

But it was holden that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Fryar's Balsam* without a stamp (which by the 42 Geo. 3, c. 56, is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, was not such a threat as a firm and prudent man might not be expected to resist, and, therefore, was not in itself an indictable offence *at common law*, although it was alleged that the money was obtained, no reference being made to any *statute* which prohibits such attempt. A count alleged that the defendant, intending to abuse the laws for the protection of the revenue, sent the following letter : —

‘SIRS,

‘I am applied to to prosecute an information against you for selling certain medicines without stamps. I have told the parties that all such informations must now be prosecuted by the public officer, and have advised them to let me write to you on the subject, and hear what you have to say. If I can be of any service to you in stopping them, you will write me accordingly, and I will get the best terms I can.’

(a) 1 Hawk. P. C. c. 53, s. 1. Reference is made to 1 Hale, 567, but *qu.* the reference.

(b) 4 Blac. Com. 126.

(c) 2 Chit. Crim. L. 149.

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#### AMERICAN NOTE.

<sup>1</sup> See *S. v. Benedict*, 11 Verm. 236.



Another count charged the defendant with corruptly attempting to extort £10 by threatening that a prosecution should be commenced for having sold Fryar's Balsam without a stamp. After argument in arrest of judgment, Lord Ellenborough, C. J., said, 'To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now, the threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not, and ought not, to have resisted. Then what authority is there for considering these as offences at common law? The principal case relied on is that of *R. v. Woodward*, (d) which was where the defendants, having another man in their actual custody at the time, threatened to carry him to jail, upon a charge of perjury; and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening, and not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action, which a man of ordinary firmness might have resisted.' (e)

It appears that, according to the principles laid down in this case, an indictment will lie, at common law, for extorting money by actual duress, or by such threats as common firmness is not capable of resisting. Therefore, where money is extorted from a party by the threat of accusing him of an unnatural crime, and from the circumstances of the case the offence does not amount to robbery, (f) there seems no reason to doubt but that it is indictable as a misdemeanor at common law. (g)

**Offences by statute.**<sup>1</sup>—Demanding property with menaces, with

(d) 11 Mod. 137, more fully stated in 6 East, R. 133.

(e) *R. v. Southerton*, 6 East, R. 126. 841. And see vol. i. p. 415.

(f) See vol. ii. p. 96, *et seq.*

(g) See a precedent in 3 Chit. Crim. L.

#### AMERICAN NOTE.

<sup>1</sup> There are statutes in most of the States of America modelled upon the English Statutes. Bishop, ii. s. 1200, referring to *S. v. Bruce*, 24 Me. 71; *P. v. Griffin*, 2 Barb. 427; *Biggs v. P.*, 8 Barb. 547; *Robinson v. C.*, 108 Mass. 15; *C. v. Moulton*,

108 Mass. 307; *C. v. Dorus*, 108 Mass. 488; *Brabham v. S.*, 18 Ohio St. 485; *S. v. Morgan*, 3 Heisk. 262; *C. v. Murphy*, 12 Allen, 449; *Shifflet v. C.*, 14 Grat. 652; *P. v. Braman*, 30 Mich. 460; *S. v. Linthicum*, 68 Mo. 66; *S. v. Barr*, 28 Mo. Ap. 84.

intent to steal; accusing, or threatening to accuse of an infamous crime with an intent to extort property, and by such accusation or threat actually extorting; the sending or delivering of a threatening letter, or writing to any person, thereby threatening to kill or murder, or to burn or destroy, or thereby with menaces demanding property; accusing, or threatening to accuse, or sending or delivering a letter, &c., accusing or threatening to accuse of certain crimes with intent to extort money, &c., are offences of the degree of felony by the provisions of recent statutes.

By the Offences against the Person Act, 24 & 25 Vict. c. 100, s. 16, 'Whatsoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (*h*) to be kept in penal servitude for any term not exceeding ten years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (*i*)

By the Malicious Injuries Act, 24 & 25 Vict. c. 97, s. 50, 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threat-

(*h*) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 204, note (*g*).

(*i*) This clause is framed from the 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

The words 'directly or indirectly cause to be received' are taken from the 9 Geo. 4, c. 55, s. 8 (1), and introduced here in order to prevent any difficulty which might arise as to a case falling within the words 'send, deliver, or utter.'

The words of the 10 & 11 Vict. c. 66, s. 1, were 'if any person shall knowingly send or deliver or utter to any other person,' and the words 'to any other person' were advisedly omitted, in order that every sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person, with directions to drop it in the garden of a house in which several persons lived, or if a person were to drop such a letter or writing anywhere, these cases would be within this clause. In truth, the new clauses make the offence to consist in sending, delivering, uttering, or directly or indirectly causing to be received any letter or writing, which contains a threat to kill or murder any person whatsoever, or to burn or destroy any house, &c., whatsoever, or to accuse any other person whatsoever of any crime, and it is wholly immaterial whether it be sent, &c., to any person or not, or whether it be sent, &c., to the person threatened, or to any other person. The cases, therefore, of *R. v. Paddle*, R. & R. 484; *R. v. Burridge*, 2 M. & Rob. 296; *R. v. Jones*, 2 C. & K. 398; 1 Den. C. C. R. 218; and *R. v.*

*Grimwade*, 1 C. & K. 592; 1 Den. C. C. R. 30, are not to be considered as authorities on these clauses so far as they decide that the letter must be sent, &c., to the party threatened.

In every indictment on this and the similar clauses in the other Acts, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered. Counts for uttering forged instruments never state the person to whom they were uttered, and they shew that such a count on this clause would clearly be good. See *Elsworth's case*, 2 East, P. C. c. 19, s. 59, p. 989, vol. ii. p. 653.

The words of the 4 Geo. 4, c. 54, s. 3, were 'any letter or writing with or without any name or signature subscribed thereto, or with a fictitious name or signature;' but the words of the 10 & 11 Vict. c. 66, s. 1, were 'any letter or writing' only, and the latter words are used in this clause, and it is clear that they are large enough to include any writing whatsoever.

The word 'maliciously' was unnecessarily introduced in the committee of the whole House of Commons, and renders this clause inconsistent with sec. 46 of the Larceny Act, and sec. 50 of the Malicious Injuries Act.

The 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1, used the terms, 'knowingly send,' &c. This was a clear inaccuracy; for it would include every person who sent or delivered a letter, though he were ignorant of its contents; 'knowingly,' therefore, has been omitted, and 'knowing the contents thereof' substituted, which really expresses the intention of the clause. See *Girdwood's case*, 1 Leach, 142.

ening to burn or destroy any house, barn, or other building, or any rick, or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (j) to be kept in penal servitude for any term not exceeding ten years [and not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (k)

By the Larceny Act, 24 & 25 Vict. c. 96, s. 44, 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, (l) any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (j) to be kept in penal servitude for life [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement], and, if a male under the age of sixteen years, with or without whipping.' (m)

Sec. 45. 'Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (j) to be kept in penal servitude [for the term of three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement].' (n)

(j) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 204, note (q).

(k) This clause is taken from the 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

See the preceding note as to the first two lines of this clause.

The clause is extended to letters threatening to burn any grain, hay, &c., in or under any building, or to kill, maim, or wound any cattle. In any indictment under this section a count should be inserted, alleging that the prisoners uttered the letter or writing without stating to whom the same was uttered. See the last note.

(l) *R. v. Chalmers*, 10 Cox, C. C. 450.

(m) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 8, and 9 Geo. 4, c. 55, s. 8 (1).

The beginning of this clause is made to correspond with the beginning of sec. 46, *infra*, of sec. 50 of the Malicious Injuries Act, and of sec. 16 of the Offences against the Person Act, as all these sections contain similar enactments. See note (i), *ante*, p. 348, for the observations on the beginning of these clauses.

The alteration as to 'property, &c.' is made in order that this clause and secs. 45, 46, and 47 may correspond.

(n) This clause is taken from the 7 Will. 4 and 1 Vict. c. 87, s. 7.

The prisoner was indicted under the above 45th section, for feloniously demanding, with menaces, five shillings from the prosecutor. The prisoner was a policeman on duty in his uniform, and the prosecutor proved that he was going home in the night, and had spoken to a woman, when the prisoner came up and said, 'You have been talking to a prostitute.' I said, 'I do not know who she is or what she is.' He said, 'You must go with me to Hotham Street, Bridewell.' I said, 'I had the care of three horses, and if he would go with me to my master, and leave the keys, I would go anywhere with him.' He said I was under a penalty of £1 and costs for talking to a prostitute in the streets, and that if I would give him 5s. I might go about my business. He pulled out a book to take my name. He asked my name, and said he would write it down. He did not write it down. He took the book out before he

Sec. 46. 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death, or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable [at the discretion of the Court] (o) to be kept in penal servitude for life, [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,] and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act.' (p)

Sec. 47. 'Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other (q) person, any property, *chattel*, money,

mentioned the 5s. I pulled out a half-crown and two-shilling piece, and he placed it in his right-hand pocket. The prisoner afterwards said, 'This is only a two-shilling piece; I must have the other six pence.' It was objected, 1st, that as the money was obtained, the case was not within the clause of the statute; 2nd, that this was not a menace within the statute, as it was a threat to accuse of a non-existing offence; but, upon a case reserved, it was held, 1st, that the first objection was not correct, because part only of the 5s. demanded was obtained; and even if the whole had been obtained, *R. v. Norton*, 8 C. & P. 671, shewed that that made no difference; 2nd, that there was no ground for the objection that this was not a menace, because it was a threat to accuse of a non-existing offence. If a policeman states that he is acting under authority, and that it is his intention to exercise the authority which he professes to have unless money is given to him, that is a menace within the statute. The threat was within the plain words of the statute. *R. v. Robertson*, 10 Cox, C. C. 9. *R. v. Walton*, L. & C. 288, had been relied on for the prisoner, and the Court did not express any approval of the judgment in that case; and the decision in this case seems to bear

against that judgment. *R. v. Knewland* being cited, Channell, B., said, 'This is a statutory offence. The decision in that case was that the facts did not support an indictment for robbery at common law,' which is the correct distinction.

(o) The words in brackets are repealed, but the punishment, except as to solitary confinement, remains the same. See *ante*, p. 204, note (g).

(p) The beginning of this clause is made to correspond with the beginning of sec. 44, of sec. 50 of the Malicious Injuries Act, and of sec. 16 of the Offences against the Person Act, as all these sections contain similar enactments. See note (i), *ante*, p. 348, for the observations on the beginning of these clauses.

(q) Prisoner went to a boy's father, and said that the boy had committed an abominable offence upon a mare belonging to him. The prisoner said that if the father would not buy the mare of him for £3 10s., he would accuse the boy. The prisoner also said the same to the boy's master. Failing in his attempt so to dispose of the mare, he preferred the charge against the boy, which was dismissed; held that the prisoner was guilty of threatening to accuse of an infamous crime within this section.

valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, [at the discretion of the Court,] (r) to be kept in penal servitude for life, [or for any term not less than three years — or to be imprisoned for any term not exceeding two years, with or without hard labour] and, if a male under the age of sixteen years, with or without whipping.’

As to inducing a person by threats to execute deeds, &c., with intent to defraud, see sec. 48, Vol. II. p. 79.

**Immaterial from whom the menaces proceed.** — Sec. 49. ‘It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person.’

As to intimidating a person with a view to compel him to abstain from doing or to do any act which he has a legal right to do or abstain from doing, see the Conspiracy and Protection of Property Act, 1875, sec. 7, Vol. I. p. 547.

In prosecutions where the prisoner is charged with *demanding* money, &c., by menaces, &c., with intent to steal, it should seem that an actual or express demand by words is not necessary.

The Court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner’s witnesses may inspect it. (s)

The cases in the Chapter on Robbery may occasionally be referred to with advantage. (t)

Some of the cases decided upon the repealed Acts may assist in the construction of the present statutes, and are therefore given in the Appendix at the end of this volume.

*R. v. Redman*, 10 Cox, C. C. 159, 35 L. J. M. C. 89. On the trial of an indictment for threatening to accuse of an infamous crime in order to extort money, the guilt or innocence of the party accused is immaterial. *R. v. Cracknell*, 10 Cox, C. C. 408. *R. v. Richards*, 11 Cox, C. C. 43.<sup>1</sup>

(r) The words in brackets are repealed, but the punishment remains the same. See *ante*, p. 204, note (g).

(s) *R. v. Harris*, 6 C. & P. 105, Little-dale, J., and Bolland, B.

(t) Vol. ii. p. 96, *et seq.*

#### AMERICAN NOTE.

<sup>1</sup> The guilt or innocence of the person threatened is immaterial in most if not all the States, Bishop, ii. s. 1201 (4).

## BOOK THE FIFTH.

### OF EVIDENCE.

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#### CHAPTER THE FIRST.

OF WHAT NATURE EVIDENCE MUST BE. — OF PRESUMPTIVE EVIDENCE, p. 354. — ON THE RULE THAT THE BEST POSSIBLE EVIDENCE MUST BE PRODUCED, p. 362. — AND OF HEARSAY EVIDENCE, p. 383.

BEFORE entering upon the subject of Presumptive Evidence, to which the following section will be appropriated, it may be proper to pay attention to a few points applicable to the law of evidence in criminal prosecutions generally.

There is in general no difference as to the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other, and what is rejected in the one ought to be rejected in the other. (a) A fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence. (b) In a criminal trial if evidence is improperly admitted the conviction is bad although there was sufficient legal evidence upon which to convict. (c)

It has been doubted whether a bill of exceptions lies in any criminal case. (d) It seems now to be settled that it does not. (e) If the judge who presided at the trial was of opinion that there was a doubt whether he might not have admitted some evidence or witness improperly, or whether the facts proved constituted the crime charged, he might formerly, in his discretion, forbear to pass sen-

(a) By Abbott, J., in *R. v. Watson*, 2 Stark. R. 155.

(b) Lord Melville's case, 29 How. St. Tr. 763.

(c) *R. v. Gilson*, 18 Q. B. D. 537, and see *Connor v. Kent* (1891), 2 Q. B. at pp. 547, 556. This doctrine has recently been affirmed by the Judicial Committee of the Privy Council. *Makin v. Att.-Gen. of N. S. W.*, 1894, A. C. 57.<sup>1</sup>

(d) *Sir H. Vane's case*, 1 Lev. 68. S. C.

Kel. 15. 1 Sid. 85. Hawk. P. C. b. 2, c. 46. s. 210. *R. v. Lord Paget and others*, 1 Leon. 5. *R. v. Nutt*, 1 Barnardist. 307. 2 Phil. Ev. 465. *R. v. Inhabitants of Preston*, Cas. temp. Hardw. 249.

(e) *R. v. Rice*, 2 Cox, C. C. 118; *R. v. Jelly*, 10 Cox, C. C. 553; *R. v. Esdaile*, 1 F. & F. 213. Lord Campbell, C. J. *R. v. Alleyne, Dears*. C. C. 505. Arch. C. P. 149. *R. v. Brown*, Arch. C. P. 149.

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#### AMERICAN NOTE.

<sup>1</sup> It seems to be the law in America that if the defendant does not object to the illegal evidence, but permits it to go to the jury, he

cannot afterwards avoid the effect of the verdict and judgment. Bishop, i. s. 997, citing *Bishop v. S.*, 9 Ga. 121.

tence, or respite the judgment, until the opinions of the fifteen judges were obtained upon a case reserved. And now by the 11 & 12 Vict. c. 78, (*f*) when any person is convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case is tried, may, in his or their discretion, reserve any question of law, which has arisen on the trial (*g*) for the consideration of the Court constituted by that Act, and forbear to pass sentence, or respite the judgment until such question is decided. (*h*)

Where the defendant has been convicted on an indictment for a misdemeanor, removed into the Court of Queen's Bench by a writ of *certiorari*, a new trial may be granted, at the instance of the defendant, where the justice of the case requires it. (*i*) Where several defendants are tried at the same time for a misdemeanor thus removed, and some are acquitted and others convicted, the Court of Queen's Bench may grant a new trial as to those convicted, if they think the conviction improper. (*j*) And it is a rule that where there is only one defendant, he must be present in court when a motion is made for a new trial. (*k*) And where several defendants are convicted upon an indictment for a misdemeanor thus removed into the Court of Queen's Bench, all must be present in court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. (*l*) But where a defendant has been found guilty of an offence, *e. g.* a nuisance, for which he is not liable to personal punishment, but only to a fine, it is not necessary that he should be present in court when a motion is made for a new trial. (*m*) Whenever it is necessary for a defendant to be present, if he be already in custody, he must obtain a *habeas corpus* to bring him into court. (*n*) The presence of the defendant is not necessary on the argument of a special verdict, as the presumption of innocence may be supposed to continue. (*o*) As a general rule, no new trial can be had where the defendant is

(*f*) See Appendix of Statutes.

(*g*) If prisoner pleads guilty, no question can be reserved under this Act, *R. v. Clark*, L. R. 1 C. C. R. 54, 36 L. J. M. C. 16; 10 Cox, C. C. 338.

(*h*) See the rules issued by the judges as to such cases reserved in 1 Den. C. C. ix.

(*i*) *R. v. Mawbey*, 6 T. R. 638. *Tidd*, 942, 943. *R. v. Whitehouse*, Dears. C. C. 1. It seems there can be no new trial in cases of felony. *Ex parte Edulgee Byramjee*, 11 Jur. 855; *R. v. Bertrand*, L. R. 1 P. C. 520, 10 Cox, C. C. 618; Att.-Gen. of New South Wales *v. Murphy*, 11 Cox, C. C. 372; *R. v. Scaife*, 17 Q. B. 238; 2 Den. C. C. 281; 13 East, 416.<sup>1</sup>

(*j*) *R. v. Mawbey*, 6 T. R. 619. *R. v. Gompertz*, 9 Q. B. 824. But in conspiracy, if several are convicted, the new trial must be as to all, though only one shews himself to be entitled to it.

(*k*) *R. v. Caudwell*, 17 Q. B. 503, 21 L. J. M. C. 48. *Howard v. R.*, 11 L. T. 629.

(*l*) *R. v. Teal*, 11 East, 307. *R. v. Askew*, 3 M. & S. 9.

(*m*) *R. v. Parkinson*, 2 Den. C. C. 459, 21 L. J. M. C. 48, note (*r*).

(*n*) *R. v. Spragg*, 2 Burr. R. 930. See *R. v. Hollingberry*, 4 B. & C. 329, where the defendant is in custody on criminal process.

(*o*) Note to *R. v. Spragg*.

#### AMERICAN NOTE.

<sup>1</sup> In America, new trials are allowed in treason, felony, and misdemeanor, see Bishop, i. s. 1003. Where the verdict is guilty as to part only, it seems doubtful

how far the whole case is re-opened by the new trial. In Ohio, the Courts have held one way, and in Wisconsin the other. See Bishop, i. s. 1005, 1006.

acquitted, although the acquittal was founded on the misdirection of the judge; (*p*) or where the defendant's own fraud has secured his acquittal, (*q*) or where a verdict is found for a defendant on a plea of *autrefois acquit*, although that raises a collateral issue, which may have been found in favour of the defendant on insufficient evidence. (*r*) But where the proceeding is in substance merely to try a civil right, a new trial may be granted where the indictment has been removed as above after an acquittal; (*s*) and therefore a new trial may be granted where the question is as to the liability to repair a highway, (*t*) but not where the charge is a wrongful obstruction of a highway. (*u*) Before the Judicature Acts, when it was intended to move the Court of Queen's Bench for a new trial in a criminal case, either the motion should be made within the first four days of term, or during those days an intimation must have been given to the Court that counsel was prepared to make that motion. (*v*)

## SEC. I.

*Of Presumptive Evidence.*

When a fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily or usually attend such facts, and are called presumptions, not proofs, for they stand instead of the proofs till the contrary be proved. (*w*) In criminal cases, from the secret manner in which

(*p*) *R. v. Cohen*, 1 Stark. N. P. C. 516. *R. v. Sutton*, 5 B. & Ad. 52.

(*q*) *R. v. Furser*, Say. 90. *R. v. Davis*, 12 Mod. 9. *R. v. Bear*, 2 Salk. 646.<sup>1</sup>

(*r*) *R. v. Lea*, 2 M. C. C. R. 9, S. C. 7 C. & P. 836.

(*s*) *R. v. Chorley*, 12 Q. B. 515. *R. v. Russell*, 3 E. & B. 942, 23 L. J. M. C. 173. *R. v. Leigh*, 10 A. & E. 398.

(*t*) *R. v. Chorley*, *supra*.

(*u*) *R. v. Russell*, *supra*. *R. v. Johnson*, 2 E. & E. 613, 29 L. J. M. C. 133. *R. v. Duncan*, 7 Q. B. D. 198.

(*v*) *R. v. Newman*, 1 E. & B. 268, 22 L. J. Q. B. 156.

(*w*) *Gilb. Ev.* 142. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword; this is a violent presumption that he is the murderer: for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do necessarily attend such fact. *Ibid.* Unless the wound was in such a part of the

body that the deceased could not have inflicted it himself, and it was shewn that no other person had been in the room, it is conceived that such a presumption ought not to be considered as conclusive. In *Ashford v. Thornton*, 1 B. & Ald. 428, where the subject of presumption in cases of murder was much discussed, Abbott, J., said, 'A case might be put where a person should come up and find another lying wounded with a dagger in his body, and should draw it out, or should, in assisting the wounded man, wrench the knife out of the murderer's hand; then, if the murderer escaped, leaving him with the body, according to this law [Bracton] he would be considered guilty of the murder, and be immediately hanged without trial.' And, 'in the history of the law, several presumptions which were at one time deemed conclusive by the courts, have, by the opinions of later judges, acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries.' 1 *Phil. Ev.* 441. C. S. G.

## AMERICAN NOTE.

<sup>1</sup> This seems to be so in America, see *Pruden v. Northrup*, 1 Root, 93. *S. v. Jones*, 7 Ga. 422. *S. v. Wright*, 2 Tread. 517. S.

*v. Brown*, 16 Con. 54. *S. v. Davis*, 4 Blackf. 345.



guilty actions are generally perpetrated, it is seldom possible to give direct evidence of the commission of the offence charged, *i. e.* to produce a witness who saw the act committed; and, therefore, recourse must necessarily be had to presumptive (or, as it is often called, circumstantial) evidence, *i. e.* the direct evidence of circumstances, from which the commission of the act may be presumed by the jury. (x)

Where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact which, taken alone, amounted to a presumption of guilt; Alderson, B., told the jury that before they could find the prisoner guilty, they must be satisfied 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person;' and he then pointed out to them the proneness of the human mind to look for, and often slightly to distort the facts, in order to establish such a proposition, forgetting that a single circumstance, which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. (y)

There is no difference between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, except that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter, which affect life and liberty. (z)

**Presumptions.** — One of the most usual presumptions in criminal prosecutions occurs in cases of larceny, where upon proof of the felony having been committed, and of the property stolen having been shortly afterwards found in the possession of the prisoner, it is presumed that he actually stole it, unless he prove how he came by it. (a)

(x) Presumptions are often divided into three sorts, — violent, probable, and light. Co. Lit. 6 b. 3 Blac. Com. 371. But such a classification seems altogether useless, and the distinction to amount to nothing more than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak. See 1 Stark. Ev. 838, *et seq.*

(y) Hodge's case, 2 Lew. 227. See the very able observations on this subject, 1 Stark. Ev. 841, *et seq.*, 859, *et seq.*

(z) 1 Phil. Ev. 166, 7th edit. Perhaps strong circumstantial evidence in cases of crimes, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt: for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. 1 East. P. C. c. 5, s. 9, p. 223.

(a) Where two prisoners were indicted

for stealing two horses, and the case against them consisted entirely of evidence to shew that both the horses were found soon after the robbery, in the joint possession of the prisoners, and it appeared that the horses had been stolen on different days, and at different places, Littledale, J., compelled the prosecutor to elect on which of the two stealings he would proceed; and his lordship observed that the possession of stolen property soon after a robbery is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking, with all its circumstances. R. v. Smith, Ry. & Mood. N. P. C. 295. Where the only evidence against the prisoner was that three sheets were found upon his bed in his house three calendar months after they had been stolen, and it was urged that this was too long a time after the larceny to call on the prisoner to give any account how he had become possessed of them; and R. v. Adams, *ante*, vol. ii. p. 288, was relied upon; Wightman, J., held that the case must go to the jury, as it seemed to him that it was impossible to lay down any definite rule as to the precise time, which was too great to call upon the prisoner to give an account of the possession, and that

So also on an indictment for the crime of arson, proof that property, which was taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner, raises a presumption that the prisoner was present, and concerned in the arson. (*b*) So also proof that clothes, weapons, or implements, which are shewn to have been previously in the possession of the prisoner, were found at or near to the spot where a felony was committed, is frequently adduced in order to raise a presumption that the prisoner was present at the time when the felony was committed. (*c*) The buying goods at an under value is said to be presumptive evidence that the buyer knew they were stolen. (*d*) Upon an indictment for perjury, in falsely taking the freeholder's oath at the election of a knight of the shire, in the name of J. W., it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., and who swore to his freehold and place of abode; and that there was no such person, and that the defendant voted on the second day, and was no freeholder, and some time afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W., it was held that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment. (*e*)

Ordinarily all instruments are written at the time they bear date, and therefore the date of any instrument is presumptive evidence

in this case there was *some* evidence, although *very slight*, for the jury to consider. The prisoner was acquitted. *R. v. Hewlett*, Salop Spring Ass. 1843, MS. C. S. G. See *R. v. Knight*, L. & C. 378, and *R. v. Langmead*, L. & C. 427, vol. ii. p. 290. Mr. Starkie observes that 'the recent possession of stolen goods is recognised by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still in effect a mere natural presumption; for although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is, therefore, essentially different from the legal presumptions in fact where a jury are to infer that a bond has or has not been satisfied, as a few days or even hours, more or less, have elapsed, when the twenty years are expiring.' 2 Stark. Evid. 684.

(*b*) *R. v. Rickman*, 2 East, P. C. 1035.

(*c*) In *R. v. Stonyer* and others, Stafford Spr. Ass. 1843, *cor. Wightman, J.*, on an indictment for burglary in the house of Keeling, evidence was given of the finding of a crowbar in the house of one Bladon, which was near Keeling's, and was broken into the same night, it being proved that the

crowbar had been previously seen in the possession of the prisoners, and a chest of drawers in Keeling's house having been broken open by such an instrument. Such is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered. 1 Stark. Ev. 844. Greenl. Ev. 49. See *R. v. Exall*, 4 F. & F. 922.

(*d*) *Ante*, vol. ii. p. 440.

(*e*) *R. v. Price*, 6 East, 323. The following is an example of a case of circumstantial evidence too weak for conviction. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the judges thought the evidence too slight to convict him. *R. v. Isaacs*, MS. Bayley, J., *ante*, vol. i. p. 216.

that it was made at the time of that date. (f) The date, therefore, of a bill of exchange is *prima facie* evidence that it was drawn at that date. (g)

Ordinarily also a bill of exchange is accepted shortly, within a few days, after it is drawn. The date of the bill, therefore, though not evidence of the very date of the acceptance, is reasonable evidence of the acceptance having taken place within a short time after that day, regard being had to the distance the bill would have to travel from the one party to the other. (h)

A very common presumption is made by a jury in favour of a defendant from the goodness of his character;<sup>1</sup> which subject, together with the presumption as to the intent of a prisoner, or his guilty knowledge respecting the act which is the subject of the indictment, raised upon the proof of prior acts unconnected with it, will be considered in a subsequent chapter, where the rule as to evidence being confined to the points in issue is discussed. (i)

Most important presumptions are derivable from the conduct of the parties, as well in civil as in criminal proceedings.<sup>2</sup> If circumstances induce a strong suspicion of guilt, and where the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him. (j)

Presumptions from a man's conduct operate in the nature of admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth. (k) And admissions may be presumed, not only from the declarations or acts of a party accused, but even from his acquiescence or silence. (l)

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. (m)

(f) *Roberts v. Bethell*, 12 C. B. 778.

(g) *Ibid.*; except in case of a bill, which constitutes a petitioning creditor's debt in bankruptcy. As to the date of letters, see vol. i. p. 716.

(h) *Per Maule, J.*, *ibid.*

(i) See also as to the presumption that a ship never heard of has foundered. *Green v. Brown*, 2 Str. 1199. *Twemlow v. Oswin*, 2 Campb. 85. *Houstman v. Thornton*, Holt, 242. *Koster v. Reed*, 6 B. & C. 19. So where a letter, fully and particularly directed to a person at his usual place of residence,

is proved to have been put into the post-office, this is equivalent to proof of delivery to the hands of that person; because it is a safe and reasonable presumption that it reaches its destination. *Per Lord Tenterden*, *Walter v. Haynes*, 1 R. & M. N. P. C. 149.

(j) 2 Stark. Evid. 688. 1 Stark. Evid. 862.

(k) *Ibid.* See *Pickard v. Sears*, 6 A. & E. 469.

(l) 2 Stark. Evid. 17, 21.

(m) 1 Phil. Evid. 447, citing *Harwood v. Goodright*, Cowp. 87. 1 Stark. Evid. 847.

#### AMERICAN NOTES.

<sup>1</sup> See *S. v. Ford*, 3 Strobb. 517. *P. v. Hammill*, 2 Parker, C. R. 223. *P. v. Stewart*, 28 Cal. 395. *Kilpatrick v. C.*, 7 Casey, 198. *S. v. Dunphey*, 4 Minn. 438. *Hopps v. P.*, 31 Ill. 385.

<sup>2</sup> See *P. v. M'Wharter*, 4 Barb. 428. *Dean v. C.*, 4 Gratt. 541. *Porter v. S.*, 2 Cart. 435.

So the fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. (*n*) Legal experience, however, has shown that false evidence has sometimes been resorted to for proving facts that are true. (*o*)

Other presumptions are founded on the experienced continuance or permanency, of longer or shorter duration, in human affairs.

When, therefore, a state of things is once established by proof, the law in general presumes that the state of things continues to exist as before, till the contrary is shewn, or till a different presumption is raised from the nature of the subject in question. (*p*)

A partnership or other similar relation, once shewn to exist, is presumed to continue till it is proved to have been dissolved. (*q*) So where an indictment alleged that the defendant made his warrant of attorney directed to A. and B., 'then and still being attorneys of the King's Bench,' it was held that as the defendant, by executing the warrant, admitted them to be attorneys at that time, it must be presumed that they continued to be so at the time when the indictment was found. (*r*)

So a party once elected to an office must be presumed to continue in it until the contrary be shewn. Thus a return made to the stamp-office by a banking co-partnership in March, 1841, stating a person to be a public officer of the company, being proof that he was an officer at that time, the presumption is that he continued such officer until November, 1842. (*s*) But if the office had been an annual office, it would have been otherwise. (*t*)

So where a building is shewn to have been properly registered for the celebration of marriages, the presumption is that it continued to be registered. (*u*)

In *R. v. Lumley*, (*v*) which was an indictment for bigamy, noticed Vol. I., p. 661, the Court said, 'The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living

(*n*) 1 Stark. Ev. 847.

(*o*) 1 Phil. Ev. 448. Referring to 3 Institute, 232, where a case is mentioned of an uncle, who was hanged for the murder of his niece, and who produced on the trial a child as like unto her, both in person and years, as he could find, but which upon examination was found not to be the true child; and it afterwards appeared that the niece had run away, and was alive. And also the Douglas Peerage case, Appendix to Evans' Pothier. 'The fabrication of evidence does not, however, furnish of itself any presumption of law against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts.' Greenl. Ev. 43.

(*p*) Greenl. Ev. 46, 47, citing Throgmorton v. Walton, 2 Roll. R. 461. Wilson v. Hodges, 2 East, R. 312. Battin v. Bigelow, 1 Pet. C. C. R. 452.

(*q*) Greenl. Ev. 48. 2 Stark. Ev. 688. Alderson v. Clay, 1 Stark. R. 405.

(*r*) R. v. Cooke, 7 C. & P. 559, Patterson, J.

(*s*) Steward v. Dunn, 12 M. & W. 655.

(*t*) Per Parke, B., *ibid*.

(*u*) R. v. Manwaring, D. & B. 132.

(*v*) See R. v. Twynning, 2 B. & Ald. 386. R. v. Harborne, 2 A. & E. 540. Upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur: as if the party sailed on a voyage, which should long since have been accomplished, and the vessel has not been heard of. Greenl. Ev. 47, referring to *In re Hutton*, 1 Curt. 595.

on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. After the lapse of seven years, without intelligence concerning a person, his death may be presumed. (*w*) But there is no legal presumption as to the time of the death within the seven years, and the fact of the party having been alive or dead at any particular period during the seven years must be proved by the party relying on it. (*x*)

So where a thing is proved to have been in a particular state at one time, it is presumed to have been in that state at a former time, unless there be evidence that at some previous time it was in a different state. (*y*) Where, therefore, in order to prove certain assessments of land-tax, the signatures of certain persons to them were proved, and it was shewn that those persons had acted as commissioners after the date of the signatures, but there was no evidence of their having so acted before, it was held that the acting as commissioners within a reasonable time after the date of the signatures was evidence that they were commissioners at that time; for the inference might be carried upwards as well as downwards. (*z*)

The *opinions* also of individuals once entertained and expressed, and the *state of mind*, once proved to exist, are presumed to remain unchanged till the contrary appears. Thus all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God till it is shewn from his own declarations. In like manner, every man is presumed to be of sane mind till the contrary is shewn; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue till disproved. (*a*)

Besides the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the

(*w*) *Hopewell v. De Pinna*, 2 Campb. 113. *Doe d. George v. Jesson*, 6 East R. 80. *Doe d. Lloyd v. Deakin*, 4 B. & Ald. 433. *Watson v. King*, 1 Stark. R. 121.<sup>1</sup>

(*x*) *Doe d. Knight v. Nepean*, 5 B. & Ad. 86. 2 M. & W. 894.

(*y*) *R. v. Burdett*, 4 B. & Ald. 124, per Best, J. In this case a letter was delivered to a person, unsealed, in Middlesex, and it was held that it must be presumed that it was sent in that state from Leicestershire, there being no evidence to the contrary.

(*z*) *Doe d. Hopley v. Young*, 8 Q. B. 63. Where a demise in ejectment was laid on the 2nd of May, it was held that the jury might presume from the evidence of there being no sufficient distress on the premises *some time* in May, that there was none in May before the 2nd, nor on the 6th of June, when the declaration was served. *Doe d. Smelt v. Fuchau*, 15 East R. 286.

(*a*) *Greenl. Ev.* 48. *Attorney-General v. Parnter*, 3 Bro. Ch. C. 443.

#### AMERICAN NOTE.

<sup>1</sup> It has been held in America not to be necessary that the party be proved to be absent from the United States; it is sufficient if it appears that he has been absent for seven years from the particular State of his residence, without having been heard from. *Greenl. Ev.* 47, note 5, citing *Newman v. Jenkins*, 10 Pick. 515. *Innis v.*

*Campbell*, 1 Rawle, 373. *Spurr v. Trimble*, 1 A. K. Marsh, 278. *Wambough v. Skenk*, 1 Penningt. 167. *Woods v. Woods*, 2 Bay, 476. 1 New York Rev. Stat. 749, s. 6. See *C. v. Thompson*, 11 Allen, 23. *Gilson v. S.*, 38 Miss. 313. *Stevens v. M'Namara*, 36 Maine, 176. *Puckett v. S.*, 1 Sneed, 355.

law presumes it to have been founded on malice till the contrary appear; and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. (*b*)

Indeed, it is a universal principle, as Lord Ellenborough observed in the case of *R. v. Dixon*, (*c*) that when a man is charged with doing an act, of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act. In the case of *R. v. Sheppard*, (*d*) uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, was held sufficient evidence of an intent to defraud that person; and it was further held, that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, would not repel the presumption of an intention to defraud. So where the prisoner was indicted (under the repealed statute, 43 Geo. 3, c. 58) for setting fire to a mill, with intent to injure the occupiers thereof, it was held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a man must be supposed to intend the necessary consequence of his own act. (*e*) So in prosecutions for forgery, a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (*f*)

In the case of *R. v. Fuller* and another, (*g*) the twelve judges were of opinion, that the having in possession a large quantity of counterfeit coin unaccounted for, without any circumstance to induce a belief that the defendants were the makers, was evidence of having procured it with intent to utter it. (*h*)

It is a presumption not admitting of proof to the contrary, that a person under the age of fourteen is unable to commit the crime of rape; (*i*) and also that an infant under the age of seven cannot be guilty of felony; (*j*) and it is a *prima facie* presumption of law that a person under the age of fourteen is not guilty of a felonious intention, until evidence be produced to shew that he is *doli capax*; for then it is said *malitia supplet ætatem*. (*k*)

In general, however, a presumption of law arises in favour of innocence until the contrary is proved; (*l*) and it arises not only in

(*b*) Fost. 255. 1 East, P. C. c. 5, s. 106, p. 340.

(*c*) 3 M. & S. 15.

(*d*) R. & R. 169. Vol. ii. p. 625.

(*e*) *R. v. Farrington*, R. & R. 207.

(*f*) *R. v. Mazagora*, R. & R. 291. Vol. ii. p. 635. See also *R. v. Hill*, 2 M. C. C. R. 30.

(*g*) R. & R. 308. *Ante*, vol. i. p. 234.

(*h*) See further as to the primary intention, including the collateral one imputed in the indictment, and the necessary proof of

the particular intent laid. *Ante*, p. 233, *et seq.* 2 Stark. Ev. 573.

(*i*) 1 Hale, P. C. 630. *R. v. Groombridge*, 7 C. & P. 582. *R. v. Eldershaw*, 3 C. & P. 396, *ante*, p. 224.

(*j*) 1 Hale, P. C. 27, *ante*, vol. i. p. 114.

(*k*) 1 Phil. Evid. 443, citing *R. v. Owen*, 4 C. & P. 236.

(*l*) See *R. v. Twynning*, 2 B. & A. 386. But see *R. v. Harborne*, *ante*, p. 358, note (*v*).

matters essentially criminal, but in every instance the rule is, that illegality is never to be presumed, but that the presumption always is, that a party complies with the law. (*m*) So it is a legal maxim, that '*omnia præsumuntur esse rite et solemniter acta donec probetur in contrarium*;' (*n*) and, therefore, it is a general presumption of law, that a person acting in a public capacity, as a peace officer, justice of the peace, constable, &c., is duly authorised to do so; (*o*) and that even in a case of murder. (*p*) And this rule of evidence runs through all offices from that of a judge to that of a vestry clerk. (*q*)

The general rule applicable to the doctrine of presumption is, that we are to presume that which reasonably accounts for the existing state of things. (*s*) Thus the relations of landlord and tenant, of partnership, and of marriage, are frequently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that state than any other. (*t*)

It may be proper here to mention the two well-known cautions of Lord Hale respecting presumptive evidence, viz. 1. That a person should never be convicted for stealing the goods *cujusdam ignoti*, because he cannot give an account of how he came by them, unless there be due proof made that a felony was committed of these goods. 2. That a person should never be convicted of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead. (*u*)

(*m*) *Sissons v. Dixon*, 5 B. & C. 758. See also *Bennett v. Clough*, 1 B. & A. 461, which was an action against a carrier for losing a parcel containing some bank notes, stamps, and a letter. For the defendant it was said, that the 42 Geo. 3. c. 81, s. 5, made it illegal to send a letter in a parcel, and that the plaintiff therefore could not recover. But there is a proviso in that section, that it shall not extend to any letter concerning goods, sent by a common carrier of goods, to be delivered with the goods to which it relates, and the Court held, that as illegality is never presumed, the defendant should have given *prima facie* evidence that the letter did not concern the stamps with which it was sent. See also *Rodwell v. Redge*, 1 C. & P. 220.

(*n*) As that a marriage was lawfully celebrated. See *R. v. Manwaring*, D. & B. 132, vol. i. p. 694.

(*o*) *R. v. Verelst*, 3 Campb. 432. *Gordon's case*, 1 Leach, 515. S. C. 1 East, P. C. pp. 312, 315.

(*p*) By Buller, J., in *Berryman v. Wise*, 4 T. R. 366. See also *R. v. Rees*, 6 C. & P. 606. *R. v. Borrett*, 6 C. & P. 124. *Butler v. Ford*, 3 Tyrw. 677; 1 C. M. & R. 662. *R. v. Murphy*, 8 C. P. 297.<sup>1</sup>

(*q*) Per Patteson, J., in *Marshall v.*

*Lamb*, 5 Q. B. 115. *Doe d. Bowley v. Barnes*, 8 Q. B. 1037. *Wolton v. Gavin*, 16 Q. B. 48; where a soldier had been enlisted more than three weeks, and had been employed to enlist recruits, and had done so, and it was held that it might be presumed that he had been attested. In this case Erle, J., mentioned an anonymous case where, in support of a marriage, the only proof that the party who performed the ceremony was a priest, was the fact that he performed it; and this was held enough. See also *Plumer v. Brisco*, 11 Q. B. 46. *Bunbury v. Matthews*, 1 C. & K. 380.

(*s*) Per Bayley, J., *R. v. St. Marylebone*, 4 D. & R. 475.

(*t*) Per Erle, J., *R. v. Fordingbridge*, E. B. & E. 678, where a witness proved that more than sixty years before he lived with the same master as the pauper, and believed him to be an apprentice, and that he was instructed by a journeyman, and lodged and boarded in the house, with two others, who were instructed in the art of a tailor, and, after proof of due search for the indentures without success, it was held that this state of things could only be accounted for by the existence of an indenture of apprenticeship.

(*u*) 2 Hale, P. C. 290.

#### AMERICAN NOTE.

<sup>1</sup> There seems to be some doubt on this point in America. See Bishop, i. s. 464 (5). It seems to have been held that a person

cannot be an officer *de facto* where there is no office *de jure*. Ex parte Snyder, 64 Mo. 58. But see Leach v. P., 122 Ill. 420.

## SEC. II.

*The best possible Evidence must be produced.*

It is a general rule that you must give the best evidence that the nature of the thing is capable of: (*v*) the true meaning of which rule is not that in every matter there must be all that force and attestation that by any possibility might have been gathered to prove it, and that nothing under the highest assurance possible shall be given in evidence, but that no such evidence shall be brought that *ex natura rei* supposes still greater evidence behind in the party's possession or power; for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the Court? As if a man offer a copy of a deed or will where he ought to produce the original, this carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it; and, therefore, the proof of a copy in this case is not evidence: (*w*) but if he prove the original deed or will to be in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: the presumption of greater evidence behind in the party's possession being overturned by positive proof. (*x*)

Hence it appears that evidence of an inferior quality, or, as it is called, secondary evidence, cannot be received until it be shewn that no evidence of a superior quality, or, as it is termed, primary evidence, can be produced. It becomes necessary, therefore, to consider, 1st, What is primary evidence. 2ndly, What is a sufficient ground for the admission of secondary evidence. 3rdly, What is good secondary evidence.

**Primary evidence.**—It has already appeared that it is the quality and not the quantity which the rule requiring the best possible evidence regards. Thus, if a will of lands is to be proved, the primary proof of the contents is the will itself; and neither an exemplification under the great seal, nor the probate in the spiritual court, will be admissible: (*y*) but one of the three subscribing witnesses will be sufficient, without calling the others to prove the execution, if he can speak to all the requisites of attestation, and the jury believe him. (*z*) So if there are several subscribing witnesses to a deed, and all are proved to be dead, proof of the signature of one will be sufficient; for the proof is, as far as it goes, complete, and not inferior in its kind to any that can be produced. (*a*) So for the purpose of proving handwriting, where it happens to be a case where there would be no

(*v*) Bull. N. P. 293.

(*w*) Ibid. Gilb. Ev. 13.

(*x*) Bull. N. P. 293.

(*y*) Bull. N. P. 246. But the probate is the best evidence as to personality.

(*z*) Bull. N. P. 264. So the execution of a will has been held to be proved by evidence

of the testimony of one of the subscribing witnesses, who was dead, given on a trial between the same parties although another attesting witness was present and not called. *Wright v. Doe d. Tatham*, 1 A. & E. 3. See also *Doe d. Spilsbury v. Burdett*, 4 A. & E. 1.

(*a*) 1 Phil. Ev. 418.



objection to the competency of the writer himself, it is not necessary to call him: it is sufficient to prove it by the evidence of some one acquainted with the general character of his writing, who, on inspection, can say he believes it to be the handwriting of the party. The evidence of such a witness is not in its nature inferior or secondary; and though it may generally be true that the writer is best acquainted with his own handwriting, and, therefore, his evidence will in general be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons who have been in the habit of seeing him write. (b) And it seems, that on the same principle, the evidence of such persons is as much primary evidence to disprove his handwriting as to prove it. (c) On an indictment for unlawfully assembling, it was held, that a paper which had been delivered by Hunt to the witness at a meeting, as a copy of certain resolutions about to be proposed and read, and which corresponded with what the witness heard read from a written paper, was admissible as evidence of those resolutions, without giving the defendant notice to produce the original. (d) And in the same case, it was decided that parol evidence of inscriptions, or devices on banners and flags displayed at the meeting, was admissible without producing the originals, though it appeared that they had been seized by the police officers, and therefore might have been produced on the part of the prosecution. (e)

The contents of a written instrument must be proved by the instrument itself, unless it be lost, or in the hands of the other party. (f) And, generally speaking, parol evidence is secondary in its nature to written evidence: and where a written instrument is required by law, or made by a private compact to express the intention of the parties, it possesses a force and authority superior to any other evidence. (g) Thus, when an agreement has been reduced into writing, the writing itself must be produced. (h) And although a day-book be the best evidence to prove any matter entered in it, yet it is not necessary to produce it to prove that no entry of a fact was made in it. (i) But, in many instances, the mere existence of written evidence will not exclude independent parol evidence to prove the same fact. Thus, where upon letting premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was then agreed that he should on a future day bring a surety, and sign the agreement, it was held that the existence of this memorandum did not preclude parol evidence of the terms of the letting. (j) So where a

(b) 1 Phil. Ev. 223, 7th edit., *post*.

(c) *Post*.

(d) R. v. Hunt, 3 B. & A. 566.

(e) Ibid. Abbott, C. J., said, 'If we were to hold that what was inscribed on a banner could not be proved without the production of the banner, I do not know upon what reason the witness should be allowed to mention the colour of the banner, or even to say he saw the banner displayed; for the banner itself may be said to be the best possible evidence of its existence and of its colour.'

(f) As to statements made by a party

being evidence against him, though they relate to the contents of a written document, see *post*, p. 382.

(g) 1 Stark. Ev. 504.

(h) Brewer v. Palmer, 3 Esp. 213, *cor.* Lord Eldon, C. J. Sinclair v. Stevenson, 1 C. & P. 582, *cor.* Best, C. J.

(i) In Macdonnell v. Evans, 11 C. B. 930, Maule, J., said, 'Suppose a man is asked whether he made an entry in his day-book, and he says, No, it cannot be necessary to produce the book.'

(j) Doe v. Cartwright, 3 B. & A. 326. See also Wilson v. Bowie, 1 C. & P. 8.

verbal contract is made for the sale of goods, and it is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, the terms of the contract may be given in evidence on the part of the vendor, without producing the writing. (*k*) Where a party paying money has taken a receipt, the circumstance of a payment having been acknowledged in writing does not make such writing exclusively primary evidence of the fact; but he may shew the payment by a person who saw the money paid, or by the admission of the other party to that effect. (*l*) If several persons be witnesses of the same fact, and one of them, to assist his memory, makes a memorandum of it, this circumstance would not exclude the testimony of the other witnesses. (*m*) So parol evidence of what a person said on the hearing of an information for a trespass in pursuit of game, under the 1 & 2 Will. 4, c. 32, is admissible, although there be a deposition which is not produced, as there is no Act of Parliament requiring the magistrates to take down the evidence in such a case; but it is otherwise in the case of felony, where the depositions must be produced, because, by statute, magistrates are bound to take down what the witnesses say. (*n*) So where the defendant made a charge against the plaintiff before a magistrate, and what he said was taken down by the clerk, but not signed either by the defendant or the magistrate, and the case was subsequently heard and depositions taken; Cresswell, J., held that parol evidence was admissible of what was said on the first examination. (*o*) So, though an entry of a marriage may have been made in the parish register according to the Marriage Act, such entry does not become the only primary evidence of the marriage, but it may also be proved by any one who witnessed it; and, indeed, in all cases except indictments for bigamy, by reputation. (*p*) Where, in order to prove a demand for the purpose of bringing an action of trover for a lease, a witness stated that he had verbally required the defendant to deliver up the lease, and at the same time served a notice in writing on him to the same effect; Lord Ellenborough, C. J., held that the written notice need not be produced; for the notices being concurrent and independent, either might be proved as evidence of the conversion. (*q*)

The above are instances of modes of proof which, notwithstanding the existence of other evidence which might be more satisfactory, are yet in their nature primary, and consequently available. It may be useful to mention also some examples of what is not the best

(*k*) *Dalison v. Stark*, 4 Esp. 163.

(*l*) *Rambert v. Cohen*, 4 Esp. 213. *Jacob v. Lindsay*, 1 East, R. 460. And if the receipt were on unstamped paper, it may be used by a witness, who saw it given, to refresh his memory, 4 Esp. 213.

(*m*) 1 Stark. Ev. 504. So in *Layer's* case for high treason, Mr. Stanley, an under-secretary of state, gave evidence of L.'s confessions, upon his examination before the council, which, though taken in writing, was not produced. 12 Vin. Abr. 96, tit. *Evidence*, A. b. 623, pl. 7.

(*n*) *Robinson v. Vaughton*, 8 C. & P. 252, Alderson, B.

(*o*) *Jeans v. Wheedon*, 2 M. & Rob. 486.

(*p*) *Morris v. Miller*, 1 W. Bl. 632. It may also be observed that, in order to make the production of the writing necessary, it must appear to relate to the matter in question. Thus where parol evidence is offered to prove a tenancy, it is not a valid objection, that there is some written agreement relative to the holding, unless it should also appear that it was made between the parties as landlord and tenant, and that it continues in force to the very time to which the parol evidence applies. *Doe v. Morris*, 12 East, 237. *Doe v. Pearson*, 12 East, 239 n.

(*q*) *Smith v. Young*, 1 Campb. 439.

possible evidence, and therefore inadmissible. Upon an indictment for having set fire to a house, with intent to defraud an insurance company, the policy is the best evidence to prove that the house was insured, and an entry to that effect in the books of the insurance office is but secondary evidence. (r) To prove the oaths required by the Toleration Act, parol evidence was held secondary, and inadmissible; because they were matters of record in the court where they were sworn. (s) It has been ruled that parol evidence is inadmissible to shew the day on which a trial at nisi prius took place; for it should be proved by the production of the nisi prius record. (t) But this position may well be doubted, for the assizes and sittings at nisi prius often continue more than a day, and though the record might simply name the first day, yet a Court for the purpose of doing substantial justice would allow it to be proved that a trial in fact took place on a different day. Where, therefore, a commission day was on the 19th of March, and an assignment of goods was made by a prisoner on the 20th, and he was convicted of felony on the 22nd, it was held that it might be proved that in fact the conviction took place on the 22nd, although the record stated the assizes to have been holden on the 19th. (u) If it be necessary to prove that a trial took place, as in the case of a prosecution for perjury committed on the trial of a cause at nisi prius, that cannot be done by parol evidence, but the record should be produced, or at least the postea. (v) And even where the transactions of courts, which are not technically speaking of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognises. (w) On an indictment on the 8 & 9 Will. 3, c. 26 (for high treason by having a mint die in possession), it was incumbent on the prosecutor to shew that the prosecution was commenced within three months, and parol evidence that the prisoner was apprehended for treason respecting the coin within three months (the offence appearing to have been committed above three months before the indictment preferred), was held by the twelve judges to be insufficient, the warrant to apprehend or to commit not being produced. (x) In the case of *Williams v. The East India Company*, (y) the question was whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of roghan which had been stored in the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them: the chief mate was dead, and no evidence was given of what had passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been

(r) *R. v. Doran*, 1 Esp. 127. *R. v. Gilson*, R. & R. 138.

(s) *R. v. Hube, Peake*, N. P. C. 132.

(t) *Thomas v. Ansley*, 6 Esp. 80, by Lord Ellenborough. *R. v. Page*, 6 Esp. 83, by Lord Kenyon. Tidd. Prac. 869. But see *R. v. Coppard*, M. & M. 118, vol. i. p. 334.

(u) *Whitaker v. Wisbey*, 12 C. B. 44.

(v) *R. v. Brown, M. & M.* 315, vol. i. p. 385.

(w) 3 Stark. Ev. 786. See *R. v. Rowlands*, 1 F. & F. 72.

(x) *R. v. Phillips*, R. & R. 369. See vol. i. p. 949.

(y) 3 East, R. 192.

made to them. Upon this evidence, the plaintiff who, it was held, was bound to prove the negative, was nonsuited by Lord Ellenborough, C. J., on the ground that the best evidence possible of the want of notice had not been produced, viz., the evidence of the conductor of stores. The Court afterwards affirmed the nonsuit; and Lord Ellenborough, in delivering their opinion, said, 'The best evidence should have been given of which the nature of the case was capable. The best evidence was to have been had by calling, in the first instance, upon the persons immediately and officially employed in the delivering, and in the receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony (namely, the presumption and inference arising from a non-communication to the other persons on board), as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case.' In a case on an indictment on the 42 Geo. 3, c. 107, s. 1, which made it felony to course a deer in an enclosed ground, without the consent of the owner of the deer; Lawrence, J., thought it necessary to call the owner of the deer, for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal. (2) But this decision has been overruled by subsequent authorities of the greatest weight: and the rule may now be considered settled that, in cases where it is necessary to prove the non-consent of the owner of the property which is the subject of the charge in the indictment, the testimony of the owner himself is not exclusively primary evidence of the non-consent; but it may be inferred from the conduct of the prisoner, and the circumstances under which the act was done. Where the prisoners were indicted on the 6 Geo. 3, c. 36, for lopping and topping an ash timber-tree, 'without the consent of the owner,' the owner, Sir J. Aubrey, had died before the trial. The offence was committed at eleven o'clock at night on the 18th of February. Sir J. Aubrey died on the 1st of March following, having given orders for apprehending the prisoners on suspicion. The land steward was called to prove, that he himself never gave any consent, and from all he had heard his master say, he believed that he never did. Bayley, J., told the jury that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, namely, Sir J. Aubrey, that they might lop and top it; and left it to them to say, whether they thought there was reasonable evidence to shew that in fact he had not given any such permission. His Lordship adverted to the time of night when the offence was committed, and to the circumstance of the prisoners' running away when detected, as evidence to shew that the consent required had not in fact been given. (a) And in three cases, reserved at once for the opinion of the twelve judges, it was held

(2) *R. v. Rogers*, 2 Campb. 654. See  
*Toleman v. Portbury*, 39 L. J. Q. B. 136.

(a) *R. v. Hazy*, 2 C. & P. 458.

that, though there must be some evidence to negative the owner's consent, his non-consent might be inferred from the circumstances, or proved by his agents. The first of the three cases was *R. v. Allen*, an indictment for killing a fallow deer in the park of the forest of Waltham, without the consent of the owner, the King; the second, *R. v. Argent*, for entering a yard adjoining and belonging to the dwelling-house of J. Greenwood, a Quaker, and taking fish out of a pond there without the consent of the owner; and the third *R. v. Chamberlain*, for taking fish in Claremont Park, belonging to Prince Leopold, without his consent. The offence in each case was committed under circumstances which the learned judge, who tried it, thought quite sufficient to warrant the jury in finding the non-consent of the owner, admitting the onus of proving such non-consent to lie on the prosecutor; but in consequence of the decision in *R. v. Rogers*, above mentioned, further evidence was gone into, by calling the persons engaged in the management of the property, but not the owners. The judges held the conviction in each of the cases right. (b)

**Ground for the admission of secondary evidence.**—If the primary evidence be lost or destroyed, or it cannot be produced, or if it be in the hands of the adverse party, then upon proof of the loss or destruction, or that it cannot be produced in the former cases, or of the fact of its being in such possession, and of reasonable notice to produce it at the trial having been given to the other party, in the latter case, secondary evidence is admissible. (c) Where secondary evidence is offered, in consequence of the loss of the primary evidence, in order to establish such loss it must be proved that diligent search has been made in those quarters from which the primary evidence was likely to be procured. The evidence of a document being lost may vary much, according to the nature of the paper itself, the custody it is in, and all the surrounding circumstances. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would take care of. (d) In the case of *Kensington v. Inglis*, (e) it was

(b) R. & M. C. C. R. 154.

(c) Besides these two instances of the loss or destruction of the primary evidences, and its being in the hands of the adverse party, it should seem that secondary evidence is admissible in all cases where it is apparent that such secondary evidence is the best, which the party, without any default, has it in his power to produce; for then the presumption of a fraudulent suppression of the better evidence, which is the foundation of the rule, must cease. Thus, if an attesting witness to a written instrument after his attestation became incompetent from interest, proof of his handwriting was admissible. *Godfrey v. Norris*, 1 Str. 34. The defendant, in an action of trespass for breaking hatches, offered in evidence articles of agreement, dated in 1745, between persons standing in the respective situations of the plaintiff and defendant. To produce this deed the defendant's attorney was called, who said he had

received it from the son of the owner of the defendant's land. This evidence was objected to as insufficient: then the son of the owner was called, who said he had received it from his father that morning; this being also objected to, the father was called; upon which the plaintiff examined him upon the *voire dire*, and objected that he could not be a witness, being interested; whereupon Holroyd, J., held, that as the father was objected to, the next best evidence had been given, and admitted the deed. *Card v. Jeans*, Manning's Dig. 375. If a deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, secondary evidence is admissible, for the original is then unattainable by the party offering such evidence. *Doe v. Ross*, 7 M. & W. 102. *Newton v. Chaplin*, 10 C. B. 356.

(d) Per Pollock, C. B. *Gathercole v. Miall*, 15 M. & W. 319.

(e) 8 East, 273.

incumbent on the plaintiff to prove the loss of a licence to trade; and a witness, who had been secretary to the governor of a colony, said it was his practice to destroy or put aside such licences among the waste papers of his office, as not being of further use, and he supposed he had disposed of the licence in question (which, after having been granted by the governor, was returned to the witness) in the same manner as other licences for ships whose voyages had been performed; but he was not sure it was destroyed. He further stated, that he had been applied to for the licence, and had searched for it; but he did not recollect whether he found it or not; though he did not think that he had found it. Lord Ellenborough, C. J., in delivering the judgment of the Court, (*f*) said, 'We are of opinion, that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty the fact of the licence being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it.' In the preceding case the search was neither recent nor made for the purpose of the cause; (*g*) and it has since been held that neither was necessary. Where, therefore, a search had been made nearly three years before the action was brought, but it did not appear for what purpose, it was held sufficient. (*h*)

Where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and having become useless on account of a second policy being effected, it had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney proved that, a few days before the trial of the action, he had searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description; it was held that this was sufficient evidence to entitle the plaintiff to give secondary evidence of the contents of the policy. In this case, Abbott, C. J., observed, that where the loss or destruction of an instrument may almost be presumed, very slight evidence of its loss or destruction will be sufficient. (*i*) If a person proved that he had searched for an envelope among his papers, and could not find it, that would be sufficient. So with respect to an old newspaper, which had been at a public coffee-room; if the party who kept the coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and said he supposed some one had taken it away, that would be sufficient. (*j*)

(*f*) 8 East, 289.

(*g*) As the witness made the search in the Bahamas, but left them in April, 1801, the search must have been before that time; the decision was in 1807.

(*h*) *Fitz v. Rabbits*, 2 M. & Rob. 60, Pattenon, J.

(*i*) *Brewster v. Sewell*, 3 B. & A. 296. *Freeman v. Arkell*, 2 B. & C. 494, Bayley, J. And for further examples of sufficient searches, see *R. v. North Bedburn*, Cald. 452. *R. v. Johnson*, 7 East, 65. *R. v. Mor-*

*ton*, 4 M. & S. 48. *Bligh v. Wellesley*, 2 Carr. & P. 400. *R. v. East Farleigh*, 6 D. & R. 147. *R. v. Stourbridge*, 8 B. & C. 96. *Pardoe v. Price*, 13 M. & W. 267.

(*j*) Per Alderson, B., *Gathercole v. Miall*, 15 M. & W. 319. In *R. v. Rastrick*, 2 Cox, C. C. 39, Platt, B., held that a label stating the amount of money in a parcel had not been sufficiently searched for, as the search had been only made at the owner's house, and not at his shop, and he could not say whether he saw the label last at his shop

Where a duplicate adjudication of bankruptcy was left at the counting-house, being the usual and last-known place of business of the bankrupts, on the 21st of June, and the place then locked up on behalf of the assignees, and the paper was seen there a fortnight or three weeks afterwards, and on the 26th of July the summons to appear was left in the same counting-house, which was unlocked for the purpose, and then locked up again, and before the trial the counting-house was searched, and neither of these papers could be found, and due notice to produce them had been given, it was held that the search was sufficient. The presumption was either that the bankrupts had got them, or that they had got into the hands of some person to whom they were of no importance, who had destroyed them. (*k*)

Where a tithing-man went to a house to execute a warrant, and read the warrant under the window of the house, where the party who was to be apprehended under the warrant then was, and an affray then took place between the tithing-man and the inhabitants of the house, during which the tithing-man stated that he lost it; that he had it in his hand when he read it under the window; and that he never saw it afterwards; that he searched his pocket for it after he had gone about a mile and a half from the house, and could not find it; and that he directed a boy to look carefully for it, on the road between the house and the place where he first missed it; and the boy swore that he had made careful search, and could not find it; it was held, on a case reserved, that secondary evidence of the warrant was properly received, although notice had not been given to the prisoner to produce it. (*l*)

But if it be proposed to give secondary evidence of a written instrument, and such instrument is traced into the possession of a particular person, the loss cannot be established without calling him as a witness; for it will not be enough to prove that he was applied to for the instrument, and upon such application said that he could not find the same, nor did he know where it was. Thus, where it was proved that an indenture of apprenticeship was of two parts, that one had been destroyed, and that the other had come to the hands of a Miss Taylor, who, when asked for it, said she could not find it; but she was not subpoenaed; this was held insufficient evidence of the loss. (*m*) So where an agreement for renting a

or at his house, though he had taken the parcel, as usual, to his house.

(*k*) *R. v. Gordon*, Dears. C. C. 586.

(*l*) *R. v. Hood*, R. & M. C. C. R. 281.

(*m*) *R. v. Castleton*, 6 T. R. 236. See also *Williams v. Younghusband*, 1 Stark. R. 139, and *Parkins v. Cobbett*, 1 C. & P. 282. In *R. v. Denio*, 7 B. & C. 620, the pauper, who had served as an apprentice, proved that the indenture was kept by his master, and when the apprenticeship expired, he asked his master for the indenture, who said he had not got it, but that it was with the overseer of the parish by which the pauper was bound apprentice, and proof was given of search among the papers of the parish for the indenture, and that it could not be

found; and that all the books and papers about that date were missing; and it was held, that as the master was living, and might have been called as a witness, and his declarations were clearly not admissible in evidence, there was not sufficient evidence to shew that a due search had been made so as to let in parol evidence of the indenture. In *R. v. Rawden*, 2 A. & E. 156, the widow of an apprentice stated that, a short time before her husband died, she asked him what had become of his indentures, and he said that he had got them away from his master after the end of his apprenticeship, and had worn them in his pocket till they were all to pieces; and it was held that evidence of this conversation was inadmis-

tenement had remained with the landlord, and he, being asked by a witness whether there was any such agreement, said, 'I cannot say for a certainty; I will search;' and told his clerk to search, which he and the witness did amongst the papers of the office, and could find no agreement; but the landlord was not examined; it was held that enough did not appear to shew that the sessions were wrong in holding that the search was insufficient. It might be that the landlord's house was the proper place of deposit, and it had not been searched. If there had been proof *aliunde* that the office was the proper place of deposit, the search would have been sufficient, though the landlord was not examined. (n) The same principle applies with respect to the person who has the legal custody of an instrument; if it is proposed to establish its loss for the purpose of giving secondary evidence of its contents, the person who has the legal custody of it should be called as a witness, or steps should be taken to make evidence of his conduct admissible. (o) So where there are two trustees of a settlement, a search for it by one of them is insufficient. (p) And where the instrument in question is the appointment to an office, the legal custody is in the officer, who is the person most interested in the instrument, and who requires its production as a sanction for those acts which he may be called upon to do under its authority. (q) If the individual to whose possession the instrument is traced be dead, an inquiry should be made of his executors, or such persons as must be presumed to have it in their possession. (r) But if the papers of the deceased were searched during his lifetime, it is unnecessary to apply to the executors or other persons to whose possession such papers may have come. (s)

sible, there being no further proof either of the indenture having been in the possession of the apprentice, or of other inquiry after it. But where, in order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill, and died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, and he had burnt it long since; and it was also proved, that inquiry was made of the executrix of the master, who said that she knew nothing about it; it was held that this proof was sufficient to let in parol evidence of the contents of the indenture. *R. v. Morton*, 4 M. & S. 48. The Court distinguished this case from *R. v. Castleton*, inasmuch as there was no proof that the indenture ever existed in the possession of the pauper, unless his declaration were taken as evidence; and if it was, in the same breath he declared it no longer existed; whereas the evidence in *R. v. Castleton* shewed that a further search was necessary. An indenture of apprenticeship may be useful after the apprenticeship has expired, to entitle the party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement. Per Abbott, C. J., *Brewster v. Sewell*, 3 B. & A. 296. And there is no reason why the master should keep it after the apprenticeship is

over, per Crompton, J., *R. v. Hinkley*, 3 B. & S. 885. The reasonable presumption, therefore, is that it would be in the custody of the apprentice; and it has been held that a search among his papers after his death was sufficient, without any search elsewhere. *R. v. Hinkley*, *supra*. But as an expired indenture sometimes remains with the master, per Maule, J., *Hall v. Ball*, 3 M. & Gr. 242, it would always be safer to search the master's papers also.

(n) *R. v. Safron Hill*, 1 E. & B. 93.

(o) *R. v. Stoke Golding*, 1 B. & A. 173.

(p) *Doe d. Richards v. Lewis*, 11 C. B. 1035.

(q) *R. v. Stoke Golding*, *supra*. The law presumes the appointment of overseers to be in the custody of some of the overseers, per Holroyd, J., *ibid*.

(r) 1 Phil. Ev. 456, 7th edit.

(s) *R. v. Piddlehinton*, 3 B. & Ad. 460. The master of an apprentice took away the indenture after it was executed, and failed in business after the apprentice had served about a year. Upon the failure, an attorney had the custody of all the papers and books of the master, and looked over them after the failure, and did not find any indenture, and it was held that this was sufficient to allow the admission of secondary evidence, though the master's widow was living, and no inquiry had been made of her; for after the evidence of the attorney it was useless



If two or more parts of a deed have been executed, the loss or destruction of all the parts must be proved, in order to lay a ground for admitting secondary evidence of its contents. (*t*)

The Court must be satisfied that due diligence has been used to find the document in question; but it is not necessary to negative every possibility; it is enough to negative every reasonable probability of anything being kept back. Where an officer or an attorney is applied to for the inspection of documents, the Court will assume, until the contrary appears, that the officer or attorney produces all the documents relating to the subject. (*u*) The search should be such as to induce the Court to come to the conclusion that there is no reason to suppose that the omission to produce the document itself arose from any desire to keep it back, and that there has been no reasonable opportunity of producing it which has been omitted, and the proper limit of the search is where a reasonable person would be satisfied that the party had *bonâ fide* endeavoured to produce the document itself. (*v*)

Whether there has been due search is a question to be determined by the Court; and any questions may be put for the purpose of shewing that there has been a reasonable and *bonâ fide* search, though the answers to them may not be evidence in the ultimate question before the Court. (*w*) Therefore witnesses may prove what inquiries they have made of persons, who are likely to have a document in their possession, and what answers they received from them, though they are not called as witnesses. (*x*)

If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible. (*y*) Where, therefore, a witness proved that he had seen the signature of a person in a parish register, it was held that the witness might prove whose signature it was, although the register was not produced; for the person who had the custody of the register was not by law compellable to produce it, and, therefore, the identity of the party might be proved by shewing that the signature was in his handwriting. (*z*)

to inquire as to her possession of the indenture.

(*t*) Bull. N. P. 254. *Doxon v. Haigh*, 1 Esp. 409. *Alivon v. Furnival*, 4 Tyrw. 751.

(*u*) *M'Gahey v. Alston*, 2 M. & W. 206. In this case a cheque, which had been drawn on the account of a parish, had been delivered to the paying clerk of the parish, and the bankers of the parish, on the same day, paid a cheque of the same amount, and their custom was to return the cheques when paid to the paying clerk. The cancelled cheques were kept in a room in the workhouse, used by the paying clerk as an office for that purpose, and application was made to the succeeding paying clerk for an inspection of the cheques he had in his office, and the paying clerk handed to the witness several bundles, which the witness looked through without finding the cheque in question, but looked at no other. The paying clerk was not called, and it was held that this was such

reasonable search for the cheque as to render parol evidence of it admissible.

(*v*) Per Alderson, B. *Gathercole v. Miall*, 15 M. & W. 319. *City of Bristol v. Wait*, 6 C. & P. 591.

(*w*) Per Lord Campbell, C. J. *R. v. Braintree*, 1 E. & E. 51.

(*x*) *R. v. Braintree*, *supra*. See *R. v. Kenilworth*, 7 Q. B. 642, where Coleridge, J., said, 'The preliminary proof is given to enable a judicial tribunal to determine whether secondary evidence can be submitted to them. In such a case a looser rule of evidence may prevail. The sessions were to make up their minds, not whether the document was destroyed or not, but whether there had been a *bonâ fide* search, and not mere carelessness and neglect, or fraud, in not producing it.'

(*y*) Per Pollock, C. B. *Sayer v. Glossop*, 2 Exch. R. 409.

(*z*) *Sayer v. Glossop*, *supra*.

And this rule will apply to documents in the possession of persons abroad, for their production cannot be enforced; still it seems that reasonable endeavours should be made to produce them.

Where a witness proved that, on his arrival at New York, the custom-house authorities took possession of all his papers, under a suspicion that he was the bearer of secessionist despatches, but ultimately all the papers were returned to him, except an agreement which it was suggested had reference to the supply of goods for the confederates in America, and the witness had made repeated applications at New York for the agreement, but was told that it had been sent to Washington, and he had made no inquiry for it at that place; it was held that reasonable efforts had been made to procure the original, and that secondary evidence was properly received. (*a*)

Where a Roman Catholic priest, shortly before a trial, went to Paris, and there saw in the possession of the Abbé Cognat a letter, in the handwriting of the defendant, and he asked the Abbé to let him have the letter in order to bring it to England, but the Abbé refused; it was held that the evidence given for the purpose of letting in secondary evidence was insufficient. It was nothing more than proof of a mere demand of the document apparently made by a stranger, who did not even disclose his purpose in making it. (*b*)

Where an overseer of a parish was duly subpœnaed to produce a rate-book, but neglected to attend the trial of an appeal between two other parishes, it was held that secondary evidence of the rate-book was inadmissible. (*c*)

On proof of the loss of a deposition in bankruptcy, secondary evidence may be given of its contents on a trial for perjury. (*d*)

There is no distinction between criminal and civil cases with respect to secondary evidence of documents in the possession of the defendant. It has been solemnly determined, that notice may be given to the defendant in a criminal prosecution to produce a paper in his possession, and in case he neglects to produce it, other evidence may be given of it. (*e*) Where secondary evidence is sought to be given, on the ground that the primary evidence is in the possession of the adverse party, in the first place, the fact of such possession must be proved. The degree of evidence, which may be necessary to prove that fact, will depend so much on the nature of the transaction, and the particular circumstances of each individual case, that it is scarcely possible to lay down a general rule on the subject. (*f*) Where an original instrument belongs exclusively to a party, or regularly ought to be in his possession according to the course of

(*a*) *Quilter v. Jorss*, 14 C. B. (N. S.) 747.

(*b*) *Boyle v. Wiseman*, 10 Exch. R. 647. But Parke, B., said during the argument, 'If it had been distinctly put to the Abbé Cognat, "It is proposed to read this letter in evidence on the trial of an action for libel; will you allow it to be placed in my hands for that purpose?" and he had refused, perhaps that might have been sufficient to admit secondary evidence.'

(*c*) *R. v. Llanfaethly*, 2 E. & B. 940. The grounds of this decision were, that the

overseer might be punished for disobeying the subpoena, and that there would be great liability to abuse, if the production of the evidence was dispensed with by the disobedience of the witness.

(*d*) *R. v. Milnes*, 2 F. & F. 10.

(*e*) *Per Buller, J.*, *R. v. Watson*, 2 T. R. 201. *Attorney-General v. Le Merchant*, 2 T. R. 201, note (*a*). *Cates v. Winter*, 3 T. R. 306.

(*f*) 2 Phil. Ev. 216.

business, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where the solicitor to a commission of bankruptcy proved that he had been employed by the defendant to solicit his certificate under the commission, and that, on looking at his entry of charges, he had no doubt the certificate was allowed, this was held sufficient proof of the certificate having come to the defendant's possession. (g) Where an instrument has been delivered to a third party, between whom and the party to the suit there exists a privity, the possession of the privity is considered the possession of the party, for the purposes of letting in secondary evidence. Thus, in an action against the owner of a vessel, for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods which he had given to the captain was held sufficient to let the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain; on account of the privity between the owner and the captain. (h) So in an action of trover against the sheriff, a notice to the sheriff's attorney was, on account of the privity between him and his under-sheriff, held sufficient to let in secondary evidence of a writ, which was proved to have come to the possession of the under-sheriff by having been returned to him during the time the sheriff remained in office. (i) So notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, though the cheque remains in the banker's hands, for the possession of the banker is the possession of his customer. (j) So where a forged deed was produced by the prisoner's attorney on the trial of an ejectment, in which the prisoner was the lessor of the plaintiff, and after the trial it was returned to the prisoner's attorney, it was held that secondary evidence might be given of it, after notice to the prisoner to produce it, without calling the attorney to prove what he had done with the deed. (k)

In order to let in secondary evidence, the instrument need not be in the actual possession of the party; it is enough if it is in his power, which it would be if it were in the hands of a party, in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain it. Where, therefore, a written contract had been

(g) *Henry v. Leigh*, 3 Campb. 502.

(h) *Baldney v. Ritchie*, 1 Stark. N. P. C. 338. *R. v. Barker*, 1 F. & F. 326.

(i) *Taplin v. Atty.* 3 Bing. 164.

(j) *Partridge v. Coates*, R. & M. N. P. C. 156, per Abbott, C. J., *S. P. Burton v. Payne*, 2 C. & P. 520, per Bayley, J. See also *Sinclair v. Stevenson*, 1 C. & P. 582, where Best, C. J., held it was enough to trace the primary evidence to the possession of an agent. But there is no such privity between the defendant, and a third person under whom he justifies, so as to make proof of the possession of such third party equivalent to the possession of the defendant. *Evans v. Sweet*, R. & M. N. P. C. 83, per Best, C. J. And Lord Kenyon held, on the trial of an information for a libel, that proof

of the delivery of a paper to the servant of the defendant was not proof of the fact of the paper being in the defendant's possession, so as to let in parol evidence of its contents, upon notice to the defendant to produce it. *R. v. Pearce, Peake*, N. P. C. 76; but see *contra*, *Pritchard v. Symonds*, Bull. N. P. 254. *Rosc. Ev.* 7, and Colonel Gordon's case, 1 Leach, 300, note (a) to Aickles's case.

(k) *R. v. Hunter*, 4 C. & P. 128, Vaughan, B. Some counts of the indictment charged that certain persons made the deed, and that the prisoner fraudulently altered it, and it was objected that previously to the receiving secondary evidence the attesting witness ought to be called; but Vaughan, B., overruled the objection.

deposited in the hands of the common agent of the defendant and the person with whom he had contracted, and notice to produce had been given to the defendant, it was held that secondary evidence was not admissible, because, even if the document were given to the defendant for the purpose of the cause, it must be returned. (*l*) And where a paper is in the hands of a person acting in an independent character, and who has a right to the possession of it, notice to the party is insufficient; and this is so, although the party justifies under the authority of that person. (*m*)

A letter which had been in the possession of the defendant was proved on the part of the defendant to be then filed in Chancery, pursuant to an order of that Court; Abbott, C. J., was of opinion, that the plaintiff, upon proof of notice to produce, was not entitled to give secondary evidence of the contents; for the letter was as much in the possession of the one party as the other. Either party might, on application to the Court of Chancery, have obtained permission to produce it. (*n*) But where a document was traced to the possession of the defendant, upon whom notice to produce it had been served, but he proved that it was then in the stamp-office (where it had been delivered to have some duties allowed), Best, C. J., held, that as he had not informed the plaintiff of that circumstance when serving the notice, secondary evidence was allowable. (*o*)

**Notice to produce.** — After the possession of the primary evidence is proved to be in the adverse party, the party offering secondary evidence must prove that he has given notice to the other side to produce the primary evidence. Such notice may be by parol as well as in writing, and if both a parol and written notice have been given, proof of either is sufficient. (*p*) It should be properly entitled; (*q*) and must not be general, but should specify the document to be produced. Thus, a notice 'to produce all letters, papers, and documents touching a bill of exchange, mentioned in the declaration, and the debt sought to be recovered,' was held too vague. (*r*) So a notice 'to produce letters and copies of letters, also all books relating to the cause,' was held insufficient to let in secondary evidence of a letter alleged to have been written nine years before. (*s*) It should also be served in reasonable time. (*t*)

(*l*) *Parry v. May*, 1 M. & Rob. 279, Little-dale, J.

(*m*) 2 Phil. Ev. 218, citing *Evans v. Sweet*, R. & M. 83. *R. v. Pearce*, Peake, 76. *Pritchard v. Symonds*, B. N. P. 254. *Whitford v. Tutin*, 10 Bing. R. 395.

(*n*) *Williams v. Munnings*, 1 R. & M. N. P. C. 18.

(*o*) *Sinclair v. Stevenson*, 1 C. & P. 582.

(*p*) *Smith v. Young*, 1 Campb. 440. *Rosc. Ev.* 7.

(*q*) *Harvey v. Morgan*, 2 Stark. R. 17, where in an action by the plaintiffs as the assignees of C. v. E., a notice to produce was entitled A. and B., assignees of C. and D. v. E., and held insufficient by Lord Ellenborough, though A. & B. were in fact the assignees of C. & D.

(*r*) *France v. Lucy*, R. & M. N. P. C. 341. *Smith v. Sandeman*, 2 Cox, C. C. 239.

(*s*) *Jones v. Edwards*, M'Clel. & Y. 139. In *Morris v. Hauser*, 2 M. & Rob. 392, Lord Denman, C. J., held a notice to produce 'all letters, written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf,' sufficient to let in secondary evidence of a letter. And in *Jacob v. Lee*, 2 M. & Rob. 33, Patteson, J., held a notice to produce 'all and every letters written by the plaintiff to the defendant relating to the matters in dispute in this action,' sufficient, and distinguished the case from *France v. Lucy*, and *Jones v. Edwards*, *supra*, on the ground that the notice mentioned the parties by whom and to whom the letters were addressed.

(*t*) As to what is considered a reasonable notice, see *Doe v. Grey*, 1 Stark. R.

In civil cases, the rule is, that notice to produce should be served before the commission day, when the party lives away from the assize town, in order that he may have an opportunity of bringing the paper required. (*u*) And, *à fortiori*, in a criminal case, where the party is in prison at a distance from his home, ought the notice be served before the commission day. (*v*) And where on a trial at the assizes for arson, with intent to defraud an insurance company, a notice to produce the policy had been served on the prisoner about the middle of the day before the trial, and his residence, where the fire happened, was thirty miles from the assize town, the notice was held insufficient. (*w*) But no general rule can be laid down, as each case must depend on its particular circumstances. Where, therefore, a document was at the assize town, in the possession of an attorney, who had acted as attorney for the prisoner on a trial where the document was given in evidence, a notice served on the commission day was held sufficient. (*x*) In town causes, service of notice on the attorney in the evening before the trial is in general sufficient. (*y*) And on a trial for conspiracy, a notice to produce a cheque served at three o'clock in the afternoon of the day before the trial, at the office of the London agents for the

283. *Bryan v. Wagstaff*, R & M. N. P. C. 327. *Drabble v. Donner*, *ibid.* 47.

(*u*) *Trist v. Johnson*, 1 M. & Rob. 259, J. A. Park, J. S. P. *George v. Thompson*, 4 Dowl. P. R. 656, where it was served on the commission day, at 5 P.M., at the attorney's residence, after he had left home for the assize town. *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182. *Hargest v. Fothergill*, 5 C. & P. 303, Taunton, J. In *Howard v. Williams*, 9 M. & W. 725, a notice was served on the defendant's attorney at his residence, twenty miles from the place of trial before the under-sheriff, at 8 P.M., on the night before the trial; the defendant resided in the same town with the attorney, but was not at home until 12 that night; and the notice was held insufficient.

(*v*) *R. v. Ellicombe*, 1 M. & Rob. 260, Littledale, J. This was an indictment for setting fire to a house with intent to defraud an insurance company, and notice was served on the prisoner in gaol on Monday, the assizes having commenced on the Friday previous, and the trial being on the Wednesday following. The prisoner's residence was ten miles from the assize town. The notice was held insufficient.

(*w*) *R. v. Kitson*, Dears. C. C. 187.

(*x*) *R. v. Hankins*, 2 C. & K. 823, Coltman, J. In this case, on a trial for perjury, it appeared that about noon on the commission day at Hereford, the trial taking place the following morning, a notice to produce a paper (with reference to which the perjury was alleged to have been committed on a trial in the county court) was served in Hereford on Mr. Cadle, the present attorney of the prisoner. The prisoner lived at Ross, fourteen miles from Hereford, and Mr. Cadle lived at Newent, twenty-five miles from Hereford; but in the notice, further notice was given that the paper was then in Here-

ford in the possession of Mr. Minett, who was then at the Green Dragon Hotel, and who had been the attorney for the prisoner at the trial in the county court, and who had previously been called upon under a subpoena *duces tecum* to produce the paper on this trial for perjury, and had been held not bound to produce it, on the ground that he held it as attorney for the prisoner; and Coltman, J., held that this notice was sufficient to let in secondary evidence of the contents of the paper. So where notice to produce certain policies of insurance was served on the attorney of the prisoner, on Tuesday evening, the prisoner being then at Maidstone, but not in custody, and the policies were twenty miles off, and the trial was on Thursday, and on the Wednesday the prisoner's attorney had sent a person to serve a subpoena at a place without four miles of where the policies were; Bramwell, B., held, that as there had been an opportunity of obtaining the policies, the notice was sufficient, and said that no general rule could be laid down, but every case must be governed by its particular circumstances. *R. v. Barker*, 1 F. & F. 326.

(*y*) *Per Gurney, B., Atkins v. Meredith*, 4 Dowl. P. R. 658. 2 Phil. Ev. 219. *Gibbons v. Powell*, 9 C. & P. 634, Gurney, B. *Leaf v. Butt*, C. & M. 451. *Meyrick v. Woods*, *ibid.* 452. But where notice to produce a receipt was served on the defendant on Saturday, the cause coming on for trial on the Monday, Gurney, B., held the service too late, and that the notice should have been served on the attorney. *Houseman v. Roberts*, 5 C. & P. 394. Where the party and his attorney both lived in Worcester, Williams, J., held that service on the Saturday during the assizes for the Monday following was sufficient. *Firkin v. Edwards*, 9 C. & P. 478.

country attorney of the defendants, who lived in Herefordshire, has been held sufficient. (z) And where a party has been served with a notice to produce sufficiently early to enable him to produce the document, it makes no difference that at the time of the service the case has been part heard. (a) But where in a town cause the service was at seven o'clock the evening before the trial, upon the attorney, who resided in London, between two and three miles from the tradesman, whose books were required to be produced, the Court of Exchequer held the notice insufficient, as the books could not be presumed to be in the possession of the attorney. (b) All these cases depend on their particular circumstances, and the question in each is, whether the notice was given in a reasonable time to enable the party to be prepared to produce the document at the time of the trial. (c) The notice may be served either on the party himself or his attorney. There is no difference in this respect between criminal and civil cases. (d) Where the defendant, an attorney, was indicted for perjury on the trial of an ejectment, in which he had acted as the attorney of the lessor of the plaintiff, and had produced a document and taken it back again, it was held that a notice to produce that document served on the defendant was sufficient, although he was not the attorney on the record in the ejectment. (e) And a notice served on a prisoner in gaol is sufficient. (f) So a notice served on a prisoner for one session of the Central Criminal Court has been held to be sufficient for a subsequent session, to which the trial had been postponed. (g)

The reason why notice to produce is required, is not to give the opponent notice that such a document will be used, so that he may be enabled to prepare evidence to explain or confirm it; (h) but it is merely to enable him to have the document in Court, to produce it, if he likes, and, if he does not, to enable the other party to give secondary evidence of it. It is merely to exclude the argument that the party desirous of proving the document has not taken all

(z) *R. v. Hamp*, 6 Cox, C. C. 167. Lord Campbell, C. J. The sheriff had seized the cheque in question in levying for a forfeited recognisance of one of the defendants, but this was held to make no difference.

(a) *Sturm v. Jeffree*, 2 C. & K. 442. Pollock, C. B. This cause began on Thursday, and at four o'clock was adjourned; before nine that evening the notice was served: all the parties lived in London. On Friday the hearing was resumed, and the document called for; and it was held that the notice was sufficient.

(b) *Atkins v. Meredith*, 4 Dowl. P. R. 658. In *R. v. Haworth*, 4 C. & P. 254, Parke, J., held a notice to produce a forged deed served on the prisoner after the commencement of the assizes too late, saying it should have been served a reasonable time before the assizes; but it does not appear whether the prisoner resided in the assize town or not. See *Royston's case*, 1 Lew. 267.

(c) *Per Alderson, B., Lawrence v. Clark*, 14 M. & W. 250, where a notice dated the 12th of February was put into the letter-box of the plaintiff's attorney in London at half-

past eight the evening before the trial, which was on the 19th, but it was not shewn whether the document was in the possession of the attorney or the plaintiff, who lived in London; and the notice was held insufficient.

(d) *Attorney-General v. Le Merchant*, 2 T. R. 201, in note (a) to *R. v. Watson*. But it has been observed that the preceding case could not have been a case of felony, and that in felony a prisoner cannot appear by attorney (per Pollock, C. B., *R. v. Downham*, 1 F. & F. 386). As, however, an attorney may in fact be employed by a prisoner, it is clear that a notice served on an attorney so employed is good; but it is, of course, necessary to prove that the attorney is so employed. *R. v. Downham, supra.* *R. v. Boucher*, 1 F. & F. 486.

(e) *R. v. Phillpotts*, 5 Cox, C. C. 329, Erle, J. It was strongly urged, but in vain, that the document would be in the possession of the lessor of the plaintiff.

(f) *R. v. Robinson*, 5 Cox, C. C. 183. Pollock, C. B., and Erle, J.

(g) *R. v. Robinson, supra.*

(h) This was stated in 1 Stark. Ev. 404.

reasonable means to procure the original. (i) If, therefore, the document be in court in the possession of the opponent, it may be called for, and if it be not produced, secondary evidence of it may be given. (j)

So notice to produce is unnecessary, when, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in actions of trover, for bonds or bills of exchange. (k) So in a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be admissible, without any formal notice to the prisoner to produce the original. On an indictment for stealing a bill of exchange, all the judges held, that such evidence had been properly admitted, though it was proved that the bill had been seen, only a few days before the trial in a state of negotiation, in the hands of a third person, who had been served with a subpœna, and did not appear; (l) and if it had been proved to have been in the custody of the prisoner, parol evidence might have been given of its contents without notice to produce. (m) So on an indictment containing a count for stealing a post letter, the direction of which is stated in the count, the direction may be proved without any notice to produce; for the count gives sufficient notice. (n) So on an indictment for forging a note, which the prisoner afterwards got possession of and swallowed, Buller, J., permitted parol evidence to be given of the contents of the note, though no notice to produce it had been given. (o) But there it might be said, that such a notice would be nugatory, as the thing itself was destroyed. (p) On an indictment for forging a deed of release, it appearing that the prisoner had stated that after he had obtained possession of the deed he had burnt it, it was held that secondary evidence of its contents was admissible. (q) In *Laver's case*, (r) on an indictment for high treason, where it was proved, that the prisoner had shewn a person a paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. So on the trial of an indictment for administering an unlawful oath, it was held that a witness might prove that the prisoner read an oath from a paper, without giving him notice to produce it. (s) But an indict-

(i) Per Parke, B., *Dwyer v. Collins*, 7 Exch. R. 639.

(j) *Dwyer v. Collins*, *supra*, overruling *Cook v. Hearne*, 1 M. & Rob. 201. See *Doe v. Grey*, Stark. 283; *Roe v. Harvey*, 4 Burr. 2484. And the attorney may be called to prove that the document is in court, *ibid*.

(k) *How v. Hall*, 14 East, 274. *Scott v. Jones*, 4 Taunt. 865. *Tidd's Pract.* 853. The practice used to be otherwise, per *Gibbs, J.*, 4 Taunt. 868.

(l) *Aickles's case*, 1 Leach, 294.

(m) 1 Leach, 297, per *Heath, J.*

(n) *R. v. Clube*, 3 Jur. (N. S.) 698, *Pollock, C. B.*, who said, 'It is very common for a person to have on his garments labels stating his name and the date when the garments were furnished by the tailor; suppose a coat with such a label were stolen, surely

it would not be requisite to give a notice to produce the label.' *R. v. Fenton*, *post*, p. 378, note (u), was cited in this case. See *R. v. Farr*, 4 F. & F. 336.

(o) *Spragge's case*, cited by Lord Ellenborough, C. J., in *How v. Hall*, 14 East, 276.

(p) Per Lord Ellenborough, C. J., *ibid*.

(q) *R. v. Haworth*, 4 C. & P. 254, *Parke, J.* See *Foster v. Pointer*, 9 C. & P. 718. *Doe d. Phillips v. Morris*, 3 A. & E. 46.

(r) 6 St. Tr. 263, *De La Motte's case*. *Coram Buller and Heath, JJ.*, 1 East, P. C. c. 2, s. 58, p. 124.

(s) *R. v. Moors*, 6 East, 419, note to *R. v. Nield*. See also *R. v. Hunt*, 3 B. & A. 566, *ante*, p. 363. And see the same case as to proving inscriptions on banners, &c., without notice to produce, *ibid*. So the prin-

ment for setting fire to a house, with intent to defraud an insurance office, does not convey such a notice that the policy of insurance will be required upon the trial, as to dispense with the necessity of a notice to produce it. (t) So where on an indictment for stealing iron out of a canal boat, it appeared that the boat had been weighed at a lock, and a ticket of the weight given to the prisoner, and it was proposed to give secondary evidence of its contents, although no notice to produce it had been given; Parke, J., held that this was not allowable, because the rule which requires notice to be given extends to criminal as well as civil cases, except where the nature of the indictment itself expressly shews the prisoner that the deed or paper in question will be wanted at the trial. (u) Upon an indictment for perjury in falsely swearing on a former trial that there was no draft of a statutory declaration, the materiality of the existence of such draft turned upon its contents, and the fact of certain alterations having been made in it. Parol evidence was admitted, not only of the fact of the existence of the draft, but of its contents and of alterations made in it, which were not in the declaration itself, without any notice to produce the draft having been given to the prisoner. Held, that such parol evidence of the draft and its contents was inadmissible, and that the nature of the indictment was not such as of itself to operate as a notice to produce, and the conviction upon such indictment was quashed. (v)

If a witness be sworn and has a document in his possession, he may be compelled to produce it, although he has not been served with a *subpœna duces tecum*; (w) and if a person be sworn, and decline to produce a document, which he has in court, on any lawful ground, secondary evidence may be given of its contents, though he has not been served with a *subpœna duces tecum*. (x)

A party called upon to produce a paper, must either produce it

ciple of the rule requiring notice to produce does not extend to a case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence was admitted, because the paper belonged to the witness, and had been secreted in fraud of the *subpœna*. *Leeds v. Cook*, 4 Esp. N. P. C. 256. *Tidd's Pr.* 853.

(t) *R. v. Kitson*, Dears. C. C. 187. *R. v. Ellicombe*, 5 C. & P. 522. 1 M. & Rob. 260, *Littledale, J.*

(u) *R. v. Humphries*, Stafford Spr. Ass. 1829, MS. C. S. G. See *R. v. Fenton*, cited 3 C. B. 760. On an indictment for larceny of a coat contained in a paper parcel, Parke, B., held that evidence of the direction of the parcel could not be given without notice to produce it. *Sed quere*, and see the cases, *ante*, p. 377. On an indictment against a son for stealing and a father for receiving boots and shoes, it appeared that a hamper

which was alleged to have contained some of the articles had been sent by the son to the father, and it was proposed to prove how it was directed; but Maule, J., doubted whether the evidence was admissible, and thereupon it was withdrawn. *R. v. Hinley*, 2 Cox, C. C. 12, S. C., but not S. P., 2 M. & Rob. 524, Maule J., said, 'The ground upon which the evidence may be admissible is the presumption that the direction does not exist; whereas there may not be the same reason for presuming that it is in existence'. Therefore, unless you can shew that it exists, it would appear that the evidence should be admitted.' 'Suppose an inscription on a bale marked "XX," would it be necessary to produce the bale?' According to the report in M. & Rob. the hamper had passed backwards and forwards between the son and father for several months. No authority was referred to in this case.

(v) *R. v. Elworthy*, 37 L. J. M. C. 3.

(w) *Snelgrove v. Stevens*, C. & M. 508, *Cresswell, J.*

(x) *Doe d. Loscombe v. Clifford*, 2 C. & K. 448. *Alderson, B.* See *Doe d. Gilbert v. Ross*, 7 M. & W. 102.



when called upon, or not at all: he cannot avail himself of it in a subsequent stage of the case. (*y*) Where, therefore, notice had been given to the defendant to produce certain receipts for rent, which he refused to produce; it was held, that he could not afterwards, as part of his case, put in the receipts for the purpose of shewing that the rent was paid to the lessors of the plaintiff and another jointly. (*z*)

Where a document is produced in consequence of a notice to produce, and it is alleged that the document is not the document in question, it is for the Court to decide whether it be so or not. (*a*) And where a document is called for after notice to produce, and some evidence is given to shew that it is in the possession of one party, the other side is entitled at once to give evidence to prove that it is not in the possession or under the control of such party, and it is for the judge to decide this question. (*b*)

The regular time of calling for the production of papers and books is not until the party who requires them has entered into his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted. (*c*)

If upon a notice to the adverse party to produce primary evidence in his possession, he refuses to produce the instrument required, the other party who has done all in his power to supply the best evidence will be allowed to go into secondary evidence. (*d*) If the party, giving due notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party, (*e*) though it is otherwise when the papers are inspected. (*f*) Secondary evidence of papers, to produce which notice has been given, cannot be entered into till the party calling for them has opened his case, before which time there can be no cross-examination as to their contents. (*g*) Where a party, after notice, refuses to produce an agreement, it is to be presumed as against him that it is properly stamped. (*h*)

**Secondary evidence.** — It remains to be considered what is good secondary evidence. (*i*) It must be observed that, previous to giving any such evidence of the contents of a deed, the original deed ought

(*y*) 2 Phil. Ev. 220. *Doe d. Higgs v. Cockell*, 6 C. & P. 525. *Jackson v. Allen*, 3 Stark. R. 74. *Lewis v. Hartley*, 7 C. & P. 405.

(*z*) *Doe d. Thompson v. Hodgson*, 12 A. & E. 135; 2 M. & Rob. 282.

(*a*) *Harvey v. Mitchell*, 2 M. & Rob. 366. In *Froude v. Hobbs*, 1 F. & F. 612, Byles, J., with the consent of the parties, left the question to the jury whether a book produced was the book in which the terms of a contract had been entered. But this was only to assist him in deciding the question.

(*b*) *Harvey v. Mitchell*, 2 M. & Rob. 366, Parke, B. If a defendant interposes such evidence, it does not give any right to the plaintiff to reply, as it is given merely for the purpose of enabling the judge to decide the question.

(*c*) 2 Phil. Ev. 222. *Graham v. Dyster*, 2 Stark. R. 23. *Sideways v. Dyson*, *ibid.* 49. 1 Stark. Ev. 403.

(*d*) *Cooper and another v. Gibbons*, 3 Campb. 363.

(*e*) *Sayer v. Kitchen*, 1 Esp. N. P. C. 210.

(*f*) *Wharam v. Routledge*, 5 Esp. N. P. C. 235. Rosc. Ev. 9, S. P., if they are at all material to the case, *Wilson v. Bowie*, 1 C. & P. 10, J. A. Park, J. *Calvert v. Flower*, 7 C. & P. 386. See *Smith v. Brown*, 2 Cox, C. C. 278.

(*g*) *Graham v. Dyster*, 2 Stark. R. 23. Rosc. Ev. 9.

(*h*) *Crisp v. Anderson*, 1 Stark. N. P. C. 35, but the party refusing is at liberty to prove the contrary, *ibid.*

(*i*) *Fisher v. Samuda*, 1 Campb. 193.

to be proved to have been duly executed. (*j*) Where the sessions found that B., who was dead, was the attesting witness to a lost indenture of apprenticeship, it was held that evidence of his handwriting was unnecessary; for the proof of handwriting could only be required to establish the identity between the deceased and the attesting witness. (*k*) So where an original note of hand is lost, a copy cannot be read in evidence unless the note is first proved to be genuine. (*l*) In secondary evidence there are no degrees, that is, no precedence or superiority in point of admissibility. An attested copy of a written instrument is not of a superior order of proof to an examined copy, nor is an examined copy superior to parol evidence of the contents. (*m*) As soon, therefore, as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. (*n*) A copy of a document taken by a machine which was worked by the witness who produces it, is good secondary evidence, though it was not compared with the original. (*o*) So a document sent by the plaintiff to the defendant with a letter stating it to be a copy of a deed, is evidence against the plaintiff, though notice to produce the deed has been given, and the deed is not called for. (*p*) But a paper delivered as a copy of a deed from the office of an attorney, but which he states he is unable of his own knowledge to vouch to be a copy, is insufficient. (*q*) The evidence of any one who recollects the contents of a letter is good secondary evidence of them, (*r*) although it is in the party's power to produce the clerk who wrote the letter. (*s*) Where it was proposed to prove that defendant was owner of a ship, by means of his affidavit, sworn for the purpose of obtaining a certificate of register, and a proper ground for the reception of secondary evidence had been laid, Lord Ellenborough held, that an entry in the register-book at the custom-house,

(*j*) Bull. N. P. 254. *R. v. Culpepper*, Skin. 673.

(*k*) *R. v. St. Giles*, 1 E. & B. 642, 22 L. J. M. C. 54. Erle, J., said, 'In no case whatever when the instrument is lost, and the attesting witness is dead, can it be necessary to prove his handwriting.' But Wightman, J., thought it not necessary to determine whether proof of such handwriting was indispensable; and Crompton, J., thought there might be cases where it might be necessary to prove such handwriting.

(*l*) By Lord Hardwicke, C. J., in *Goodier v. Lake*, 1 Atk. 246.

(*m*) 2 Phil. Ev. 236. Bull. N. P. 254, *Munn v. Godbold*, 3 Bing. 292. *Rhind v. Wilkinson*, 2 Taunt. 237. *Eyre v. Palsgrave*, 2 Campb. 605.

(*n*) Per Parke, B., *Doe d. Gilbert v. Ross*, 7 M. & W. 102. In that case on the trial of an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and it was held that the shorthand writer's notes of the contents of the deed were admissible in evidence, although there was an attested copy, which being unstamped was rejected. In *Brown*

*v. Woodman*, 6 C. & P. 206, Parke, J., held that parol evidence of the contents of a letter was admissible, although a copy of the letter existed. See *Doe d. Morse v. Williams*, C. & M. 615. In *Hall v. Ball*, 3 M. & Gr. 242, in trover for an expired lease by the lessor, the lease or counterpart executed by the lessor not being produced by the defendant upon notice, it was held that the lessor might give parol evidence of the contents without producing the counterpart executed by the lessee. And see *Newton v. Chaplin*, 10 C. B. 356.

(*o*) *Simpson v. Thornton*, 2 M. & Rob. 433, Maule, J.

(*p*) *Ansell v. Baker*, 3 C. & K. 145. This decision, perhaps, rather rests on the ground that the plaintiff had admitted the existence of such a deed, and that such admission was evidence against him independently of the notice to produce; still it was an admission of the correctness of the copy.

(*q*) *Volant v. Sover*, 13 C. B. 231.

(*r*) *Liebman v. Pooley*, 1 Stark. N. P. C. 167, by Lord Ellenborough. But a copy of the original copy of a letter is not good secondary evidence, *ibid*.

(*s*) *R. v. Chadwick*, 6 C. & P. 181, Tindal, C. J.

stating that the certificate had been granted on an affidavit of the defendant that he was owner, was not admissible as secondary evidence. The collector's clerk, or some person who had seen the affidavit, and knew that it was made by the defendant, ought to have been called. (t) Where there are two parts of a written agreement, both executed at the same time, the one stamped and the other unstamped, the unstamped part, upon being proved to be correct by a witness, is admissible as secondary evidence of the contents of the stamped part. (u) So where there was a properly stamped agreement under seal, and a counterpart of it unstamped, and the plaintiff proved the loss of the deed itself, and proposed to read a draft copy in evidence, it was held that the unstamped counterpart, which was produced after notice by the defendant, might be read as secondary evidence of the contents of the lost deed. (v)

There are some particular cases, where the rule that the best possible evidence must be produced has been relaxed. Where it is necessary to prove an entry in a public book, the original book need not be shewn; but from a principle of general convenience, an examined copy will be admitted. (w) The post-office marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong at the dates those marks specify; (x) but a mark of double postage on such a letter is not in itself evidence that the letter contained an enclosure, (y) and it has been held that the post-mark is not evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark. (z) The muster-books of the King's ships, documented in the navy office, to which returns are regularly made, by the commanders, of the names, &c., of their respective crews, may be admitted as evidence of the persons therein named having served on board the several ships in the capacity there mentioned. (a) So in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments; (b) and that even in a case of murder. (c) A witness may be examined on the *voire dire* (d) as to contents of a written instrument, without notice having been given to produce it. (e) And where a witness is cross-examined for the purpose of impeaching his credit, such cross-examination is sometimes allowed to be conducted without regard to the rule under consideration. As to questioning a witness whether he has been convicted of a felony or misdemeanor, without producing the con-

(t) *Teed v. Martin*, 4 Campb. 90.  
 (u) *Waller v. Horsfall*, 1 Campb. 501.  
 (v) *Munn v. Godbold*, 3 Bing. 292. See also *Garnons v. Swift*, 1 Taunt. 507.  
 (w) 1 Phil. Ev. 432.  
 (x) *R. v. Plumer*, Russ. & Ry. 264.  
 (y) *Ibid.*  
 (z) *R. v. Watson*, 1 Campb. 215. *Fletcher v. Braddyll*, 3 Stark. N. P. C. 64.  
 (a) *Rhodes's case*, 1 Leach, 24. And see *Aickles's case*, 1 Leach, 390, where it was held that the daily book of a prison is good evidence to prove the time of a prisoner's discharge.

(b) 1 Phil. Ev. 432. *Ante*, p. 361.  
 (c) By Buller, J., in *Berryman v. Wise*, 4 T. R. 366.  
 (d) As to the meaning of this expression, see *post*.  
 (e) *Howell v. Locke*, 2 Campb. 15. 'An examination on the *voire dire* is for the purpose of establishing something of which the Court is to be the judge and not the jury; it may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' Per Maule, J., *Macdonnell v. Evans*, 11 C. B. 930.

viction, see *post*. As to asking a witness on cross-examination, for the purpose of trying his credit and veracity, whether he has not given an account in writing different from his present testimony, without producing the writing itself, see *post*. It seems that the general rule, that the best evidence is to be produced which the nature of the thing admits, is to be understood as applying only to the proof of the issue, or of some fact material to the issue. (*f*)

Whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing. (*g*) The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources where the written evidence might have been produced, for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so. (*h*) And such an admission is legal evidence, not as secondary evidence of the contents of a written instrument, but as original evidence. (*i*) And the principle is the same, whether the admission is by words or by acts: and a man may by his acts make an admission as clearly and as much in detail as he possibly could by words. (*j*)

If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. (*k*) But if any of the terms of the tenancy, as, for example, who is the lessor, or what is the rent, or what rent is due, (*l*) are in issue, and it appears that there was a written contract for the tenancy, such contract must be produced. (*m*) But the statements made by a tenant of the terms upon which he is actually holding the premises, are admissible against him in order to prove the terms of his tenancy, though the tenancy was created by adopting the terms of a former demise in writing. (*n*)

So the fact that a person is employed as a servant under a written agreement may be proved without its production, but not the terms of it. (*o*)

Inscriptions on walls, and fixed tables, mural monuments, grave-stones, surveyors' marks on boundary trees, as they cannot be conveniently produced in court, may be proved by secondary evidence. (*p*)

(*f*) Ibid. 301, 7th ed. See *Henman v. Lestor*, 31 L. J. C. P. 366.

(*g*) Per *Parke, B., Slatterie v. Pooley*, 6 M. & W. 664. *Tupper v. Folkes*, 9 C. B. (N. S.) 797.

(*h*) Per *Parke, B., Slatterie v. Pooley. Erle v. Picken*, 5 C. & P. 542, *Parke, B.*

(*i*) Per *Patteson, J., R. v. Basingstoke*, 14 Q. B. 611.

(*j*) Per *Coleridge, J., ibid.* In this case it was held that the payment of relief to a pauper whilst resident in one parish by the overseers of another parish for several years, after a threat by the overseers of the

former parish to remove the pauper, unless a certificate was obtained, was an admission that a certificate had been obtained.

(*k*) *Greenl. Ev.* 100. *R. v. The Holy Trinity, Kingston-upon-Hull*, 7 B. & C. 611; 1 M. & R. 444.

(*l*) *Angustien v. Challis*, 1 Exch. R. 279.

(*m*) *R. v. Rawden*, 8 B. & C. 70. *R. v. Merthyr, Tidvil*, 1 B. & Ad. 29. *Doe v. Harvey*, 8 Bing. R. 239.

(*n*) *Howard v. Smith*, 3 M. & Gr. 255.

(*o*) *R. v. Duffield*, 5 Cox, C. C. 404. *R. v. Rowlands*, 5 Cox, C. C. 415 (*b*).

(*p*) *Greenl. Ev.* 106, citing *Doe d. Coyle*

Such exceptions are in cases where the material on which the document is written is not easily removed ; as in the case of things fixed to the ground or to the freehold, for the law does not expect a man to break up his freehold for the purpose of bringing a notice into court. But that ground of exception does not apply to the case of a notice painted on a board, fastened by a string to a nail in a wall, as there could be no difficulty or inconvenience in removing the board from the nail on which it was hung, and producing it in court. (q) Where on an indictment for murder, the point was very much argued whether the inscription on a coffin-plate could be given in evidence without producing the coffin-plate itself, Maule, J., held that it could not, because the presumption was that it was in existence. (r)

On an indictment for bigamy, it has been held that a photograph taken from the prisoner, who said it was that of her first husband, might be shewn to a witness, and he might be asked whether it represented the man, whom he had seen married. (s)

## SEC. III.

*Of Hearsay Evidence.*

There is no rule in the law of evidence more important or more frequently applied than the general one, that hearsay evidence of a fact is not admissible. If any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth ; and the reason of the rule is, that evidence ought to be given under the sanction of an oath, and that the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning all the particulars of his statement. (t)

And the same rule applies to the written statements of either living or deceased persons. Where, therefore, after the death of one Stuart, a tin case containing papers was delivered by a servant to their master ; and one of these papers was endorsed in Stuart's handwriting, 'My own private affairs,' and it contained a paper purporting to be a certificate of the minister and elders of the kirk session at Canongate in Edinburgh, and given by them to Stuart. It was usual for the minister and elders of the kirk session, when a person left the congregation to give a certificate to enable him to be admitted into any other congregation. A book containing the minutes of the kirk session of their transactions was also produced, and the session clerk of Canongate was called to prove that he had learnt the handwriting of the parties who had signed the certificate

v. Cole, 6 C. & P. 359, Patteson, J. R. v. Fursey, 6 C. & P. 81.

(q) Jones v. Tarleton, 1 Dowl. P. R. (N. S.) 625, 9 M. & W. 675.

(r) Anonymous, stated by Maule, J., in R. v. Hinley, 1 Cox, C. C. 12.

(s) R. v. Tolson, 4 F. & F. 103. Willes, J., who said, 'The photograph was admis-

sible, because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person, or the object it represents ; and, therefore, is in reality only another species of the evidence, which persons give of identity when they speak merely from memory.'

(t) 1 Phil. Ev. 229, 7th ed. ; 206, 9th ed.

by looking at the minutes in the book. It was objected that the witness could not be permitted to look at the book in order to become acquainted with the handwriting therein; 2nd, that the book itself was not evidence, and could not be used for any purpose; 3rd, that the certificate itself would not be evidence even if the signatures to it were proved; 4th, that as the servant who delivered the papers to the master was not called, there was no proof that the certificate had ever been in Stuart's possession; 5th, that the endorsement on the paper containing it was inadmissible, and that all it shewed was that one paper had once been in his presence; and it was held that the certificate was inadmissible. (*u*)

There are, however, certain instances, which it will be the object of this section to point out, where hearsay evidence is admissible, because either the objection does not apply, or from the necessity of the case the rule is relaxed.

Many things which pass in words only are really acts, and are therefore admissible. Such are all contracts by parol. So is a claim to land or goods. (*v*) So directions given by words are admissible. (*w*)

When hearsay is part of the *res gestæ*.<sup>1</sup>—When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable. (*x*) Thus in *Lord George Gordon's case*, on a prosecution for high treason, it was held that the cry of the mob might be received in evidence as part of the transaction. (*y*) And, generally speaking, declarations accompanying acts are admissible in evidence as shewing the nature, character, and object of such acts. (*z*) Thus, where a person enters into land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like; (*a*) or changes his actual residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or, in fine, does any other act material to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts indicating a present purpose and intention,' and are

(*u*) *R. v. Barber*, 1 C. & K. 434. Gurney, B., Williams and Maule, JJ. The statement in the text is more accurate than that in C. & K. The judges did not intimate the ground on which the certificate was inadmissible.

(*v*) *Ford v. Elliott*, 4 Exch. R. 78. Rolfe, B., 'A claim may be manifested by words as well as acts. Whether it be by words or otherwise seems to me to be perfectly immaterial.' Alderson, B., 'If I were to say "Take these goods away," and put them

into your hand, that would clearly be an act.'

(*w*) *R. v. Wilkins*, 4 Cox, C. C. 92, where Erle held that a witness might prove that he made enquiries, and in consequence of directions given him in answer to those enquiries he followed the prisoners until he apprehended them.

(*x*) *Rosc. Ev.* 30.

(*y*) 21 *How. St. Tr.* 535.

(*z*) 1 *Stark. Ev.* 51, 87, 88, 89.

(*a*) *Co. Litt.* 49 *b*, 245 *b*. *Robinson v. Swett*, 3 *Greenl.* 316. 3 *Blac. Com.* 174, 175.

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<sup>1</sup> See *U. S. v. Craig*, 4 *Wash.* 729. *Frisbie*, 19 *Conn.* 205. *Colquett v. S.*, 34 *Tompkins v. Saltmarsh*, 14 *Serg. & R.* 275. *Texas*, 550. *Dukes v. S.*, 11 *Ind.* 557. *S. Tenney v. Evans*, 14 *N. H.* 353. *Russell v. Davidson*, 30 *Verm.* 377.

therefore admitted in proof like any other material facts. They are part of the *res gestæ*. (b) Thus, where a constable, who was indicted for a forcible entry into a house, had searched the house, having a warrant in his hand, Lord Tenterden, C. J., held that what he said at the time as to who he was searching for, was admissible, although the question was asked by his counsel, and the answer might be in his favour. (c) But where the prisoner, who was indicted for burning a Bible, had employed some boys to take books to a place where they were burnt by his direction, it was held that what a person, who first appeared when the burning was going on, said at the time he tore up a book and threw it into the fire was not admissible, as there was no common object proved between him and the prisoner. (d)

Upon an indictment for the murder of Harriet Louisa Lane, a witness, named Ellen Willmore, was called. The witness was the person who had last seen Harriet Louisa Lane on the afternoon of the 11th of September, 1874, when the latter left her lodgings at 3, Sydney Square, Mile End. After that date Harriet Louisa Lane was not seen again alive, and that was the date fixed upon by the prosecution as the time when the murder was perpetrated. The witness, having described what occurred at the parting between her and Harriet Louisa Lane on that afternoon, was asked whether Harriet Louisa Lane, at the time of her departure from the house, made a statement to her. In answer to an objection made by the prisoner's counsel to a question which he anticipated would follow upon this, Cockburn, C. J., said, 'All that is proposed to ask now is the question, "When going away did she make a statement?" That question can be put, but not the question, "What statement did she make?" The question at present only goes to the extent of ascertaining whether a statement was made, and there it stops; but I agree that if it went further, to the extent of enquiring what was the statement, it would be inadmissible. You are constantly meeting with such a question, "Did so-and-so make a statement to you, and, in consequence of that communication, did you do anything?" The fact that some statement was made is undoubtedly admissible.' The Attorney-General, who appeared for the prosecution, then said, 'The woman is leaving her house when she makes a statement, which is a declaration of intention, and it is submitted that that is a statement accompanying an act. It is part of the act of leaving, and on that ground it is proposed to ask the question to which objection has been made.' Cockburn, C. J., 'It was no part of the

(b) Greenl. Ev. 120, citing *Bateman v. Bailey*, 5 T. R. 512. *Rawson v. Haigh*, 2 Bingh. R. 99. *Newman v. Stretch*, M. & M. 338. *Ridley v. Hyde*, 9 Bing. 349. *Smith v. Cramer*, 1 Bing. N. C. 585. *Gorham v. Canton*, 5 Greenl. 266. *Fellowes v. Williamson*, M. & M. 306. *Vacher v. Cocks*, M. & M. 353, 1 B. & Ad. 145.

(c) *R. v. Smyth*, 5 C. & P. 201. And see 1 Stark. Ev. 62, 350, 351. *Walters v. Lewis*, 7 C. & P. 344. Where an agent paid money into a bank, *Littledale, J.*, held that what he said about the money at the time he paid the money into the bank was

admissible. *R. v. Hall*, 8 C. & P. 358. The learned judge admitted the evidence, on the ground that it was a declaration by an agent acting within the scope of his authority; but it seems equally admissible, as a declaration accompanying the act of payment, and explanatory of the purpose of the payment. C. S. G. See *R. v. Edwards*, 12 Cox, C. C. 230.

(d) *R. v. Petcherini*, 7 Cox, C. C. 78, *Crompton, J.*, and *Greene, B.* It seems clear that the acts of the person were inadmissible on the same ground.

act of leaving, but only an incidental remark. It was only a statement of intention, which might or might not have been carried out. She would have gone away under any circumstances. You may get the fact that on leaving she made a statement, but you must not go beyond it.' (e)

Where the deceased person, who was a constable, had made a verbal report to his superior officer in the course of his duty, and in the absence of the accused, as to where he (the deceased) was going, and what he was going to do, the report was held admissible in evidence against the prisoner, the evidence being material to shew that he intended to watch the prisoner's movements on the occasion in question. (f)

**Complaints.**<sup>1</sup>—In an action by a husband and wife for wounding the wife, Holt, C. J., allowed what the wife said immediately upon the hurt received, and before she had time to devise anything for her own advantage, to be given in evidence as part of the *res gestæ*. (g) So on an indictment for manslaughter, in killing a party by driving a cabriolet over him, it has been held that a statement made by the deceased immediately after the accident, as to the cause of the accident, is admissible. (h) And Lawrence, J., said, in *Aveson v. Lord Kinnaird*, (i) that it is in every day's experience, in actions of assault, that what a man has said of himself to his surgeon is evidence to shew what he suffered by the assault. Enquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time; and what were the symptoms, what the conduct of the party themselves at the time, are always

(e) *R. v. Wainwright*, 13 Cox, C. C. 171. Cockburn, C. J. A similar objection to the above was taken to certain evidence of a like kind preferred on behalf of the prosecution in the case of *R. v. Pook*, tried before Lord Chief Justice Bovill, at the Old Bailey Sessions, on the 15th of July, 1871, and reported in the Sessions Paper of that date. There the prisoner was charged with the wilful murder of Jane Maria Clousen. The murder was committed on the night of the 25th or the morning of the 26th of April, 1871, at Eltham. The deceased was discovered in a dying state in Kidbrooke Lane. She had lived in the prisoner's family, and suspicion attached to him. One of the witnesses, Fanny Hamilton, who was called by the prosecution, proved that for ten days prior to the 25th of April the deceased had lodged in her house, that on the evening of that day she went out in her company, and that after walking about for some time they parted, when the deceased told her where she was going. It was proposed by the counsel for the prosecution to ask the question, 'What did she say to you?' To this the counsel for the prisoner objected, on the ground

that whatever was said was said in the prisoner's absence, and he had no means of cross-examining upon it. It was thereupon contended by the counsel for the prosecution that it was a declaration so far accompanying the act itself as to render it part of the *res gestæ*, and he cited in support of his contention the case of *Hardley v. Carter*, reported, 8 New Hampshire Reports, American Reports; and at the termination of the argument the Lord Chief Justice refused to permit the question to be put. See 13 Cox, C. C. 172, note.

(f) *R. v. Buckley*, 13 Cox, C. C. 293, per Lush, J., after consulting Mellor, J. It is rather difficult to reconcile this case with previous decisions, but the reason for admitting the evidence may possibly have been that it was an official report in the ordinary course of the business of the deceased.

(g) *Thompson v. Trevanion*, Skin. 402, cited by Lord Ellenborough, C. J., in *Aveson v. Lord Kinnaird*, 6 East, 193.

(h) *R. v. Foster*, 6 C. & P. 325, J. A Park and Patteson, JJ., and Gurney, B.

(i) 6 East, 193. 1 Phill. Ev. 191.

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<sup>1</sup> See *S. v. Howard*, 32 Verm. 380. *Phillips v. Kelly*, 29 Ala. 628. *Hunt v. P.*, 3 Parker, C. R. 569.



received in evidence upon such enquiries, and must be resorted to from the very nature of the thing. (j). So a conversation as to the state of the health of a deceased person, between him and a witness, is admissible to prove that he was in good health at the time. (k) So on a prosecution for robbery, it has been held, that the fact of the party robbed making a complaint to a constable shortly after the robbery, and mentioning the name of a person, as the name of one of the persons who had robbed him is admissible, but not the name so mentioned. (l) So on a prosecution for a rape, it has been held that the prosecutor may prove that the woman made a complaint recently after the injury: (m) so it has also been considered allowable, on an indictment for an assault on an infant of five years old, with intent to ravish her, to give evidence of the child's having complained of the injury recently after it was received. (n) But the particulars of such a complaint are not admissible in evidence on the part of the prosecution. (o) It is not, therefore, competent on the part of the prosecution, to ask what name the prosecutrix mentioned at the time she made such a complaint. (p) And although what the prosecutrix said at the time of the committing the offence would be receivable in evidence, on the ground that the prisoner was present, and the violence going on, yet, if the violence was over, and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence. (q)

The fact of the prosecutrix having made a complaint is only admissible for the purpose of confirming her testimony; in case, therefore, of her death, or absence from any cause, neither the

(j) By Lord Ellenborough, C. J., 6 East, 195. 'When a patient enters into a history of his complaint, and relates some earlier symptoms experienced at a former period, he is giving a narrative from memory rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he (so) says ought not to be received in evidence.' 1 Phill. Ev. 191. And 'although it is now settled that what a patient says to a medical man about his sufferings is receivable in evidence, it should seem that a statement by him respecting the particular cause of his sufferings (as, for example, the circumstance of an assault which he had received) would be open to greater objection.' 1 Phill. Ev. 192.

(k) R. v. Johnson, 2 C. & K. 354. A complaint by a deceased child of being hungry, made in the absence of the prisoners, was admitted in evidence. R. v. Conde, 10 Cox, C. C. 547. 'This was an indictment for withholding necessary food from a child whereby he died.'

(l) R. v. Wink, 6 C. & P. 397, Patteson, J. It was also held that the constable might be asked whether in consequence of the prosecutor mentioning a name to him, he went in search of any person, and who that person was; but in R. v. Osborne, C. & M. 622, this point was questioned by Cresswell, J., who said, 'It seems to me to be rather too refined a distinction to

prevent the name from being mentioned, and yet to permit it to be asked whether in consequence of what was said the witness apprehended a particular person. I think you ought not to go so far as that.' But where, on a trial for murder, it was proved that a shout was heard, and a witness went out of her house and saw the deceased, who seemed very weak and injured, and the moment she came up to him she asked him what was the matter; Monahan, C. J., held that the witness might add, 'he said he was robbed by the man who walked with him from the cross roads,' on the ground that this was part of the *res gestæ*. R. v. Lunny, 6 Cox, C. C. 477. This case deserves reconsideration. See *ante*, p. 233.

(m) R. v. Clarke, 2 Stark. N. P. C. 242. Such evidence is now considered quite essential in order to support the statement of the prosecutrix. C. S. G.

(n) 1 East, P. C. c. 10, s. 5, p. 444.

(o) 1 Phill. Ev. 193, *ante*, p. 233, note (r).

(p) R. v. Osborne, C. & M. 622, Cresswell, J. But the counsel for the prisoner may, if he thinks fit, ask the prosecutrix as to the terms of the complaint, and if he does so, the counsel for the prosecution has a right to examine as to all that was said by her in the same conversation. C. S. G.

(q) Per Cresswell, J., R. v. Osborne, *supra*.

particulars of the complaint, nor the fact of such complaint having been made, are admissible in evidence. (r) The tendency, however, of modern judges has been to admit in evidence complaints in detail. (s)<sup>1</sup>

On a charge of larceny, where the proof against the prisoner is, that the stolen property was found in his possession, it would be competent to shew, on behalf of the prisoner, that a third person left the property in his care, saying he would call for it again afterwards; for it is material in such a case to enquire under what circumstances the prisoner first had possession of the property. (t)

Where a witness had had a conversation with a prisoner about arsenic, but could not fix the time when this happened, it was held that an observation respecting this conversation made by the witness after the prisoner left to a person in the shop at the time, might be proved by that person, in order to fix the time when the conversation took place. (u) Where a prosecutor had for three days concealed a burglary committed in his house, fearing the vengeance of the prisoners; Erle, J., held that his wife might prove that 'he told me not to tell of it; he said he was out late at night with his horses, and should not be safe;' for conversations that explain a man's conduct are admissible in evidence. (v)

If there had been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness given upon oath at the former trial is admissible on the subsequent trial, and may be proved by one who heard him give evidence; (w) but the witness must speak to the very words, and not merely swear to the effect of them. (x) 'He ought,' said Lord Kenyon, 'to recollect the very words; for the jury alone can judge of the effect of words.' (y) In what cases the depositions of a witness before a committing magistrate may be read in evidence at the trial, will be hereafter considered.<sup>2</sup>

**Dying declarations in cases of homicide.** — Besides the usual evidence of guilt in general in cases of felony, there is one kind of evidence peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow as to the fact itself, and the party by whom it was committed. (z) The general principle on which

(r) *R. v. Megson*, 9 C. & P. 420, Rolfe, B. *R. v. Guttridge*, 9 C. & P. 471. Parke, B.; 1 Phill. Ev. 193.

(s) *R. v. Wood*, per Bramwell, L. J. 14 Cox, C. C. 46.

(t) 1 Phill. Ev. 234, 7th edit.

(u) *R. v. Richardson*, 1 Cox, C. C. 361. Lord Denman, C. J., and Alderson, B.

(v) *R. v. Glandfield*, 2 Cox, C. C. 43.

(w) *R. v. Carpenter*, 2 Show. 47; 2 Hawk. P. C. c. 46, s. 29; 1 Phill. Ev. 337; and Mr. Starkie's note to *R. v. Smith*, in the second volume of his Reports, p. 211.

(x) Lord Palmerston's case, cited by Lord Kenyon in *R. v. Jolliffe*, 4 T. R. 290.

(y) *Ennis v. Donisthorpe*, MS. 1 Phill. Ev. 231, 7th edit. By this it is conceived his lordship meant, not that the witness's testimony would go for nothing, unless he could swear positively they were the very words used by the deceased, and no other; but that the present witness ought to say, 'To the best of my recollection these were the very words used.'

(z) 1 East, P. C. c. 5, s. 124, p. 353.

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<sup>1</sup> And this is so in America. *Laughlin v. S.*, 18 Ohio, 99. *S. v. Kinney*, 44 Conn. 153; but see *P. v. M'Gee*, 1 Denio, 19.

<sup>2</sup> See *S. v. Hooker*, 17 Verm. 658. *Summons v. S.*, 5 Ohio (N. S.), 325. *S. v. Houser*, 26 Mo. 431.

this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. (a) It is therefore evident that declarations, though proved to have been made by a person in a dying state, are not admissible, unless it also appears that the deceased himself apprehended that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions. (b) 'It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were *made under a sense of impending death*;' (c) but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances (d) of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. It is the *impression* of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible.' (e) The question is

(a) Per Eyre, C. B., in Woodcock's case, 1 Leach, 500.

(b) Per Eyre, C. B., *ibid*.

(c) R. v. Forester, 10 Cox, C. C. 368, 4 F. & F. 857. Smith's case, 1 Lew. 81. Ashton's case, 2 Lew. 147. Minton's case, 1 M'Nally, Gr. 386. R. v. Howell, 1 Den. C. C. 1; 1 C. & K. 689, where per Lord Denman, C. J., 'We all think the case beyond all doubt. Danger existed. The deceased clearly thought he was dying, and had no hope of recovery. There is no ground for holding his declaration inadmissible.' R. v. Thomas, 1 Cox, C. C. 52. R. v. Peel, 2 F. & F. 21, where per Willes, J., 'It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. There does appear to have been such an expectation in this case, and I shall therefore admit the declaration.' R. v. Brooks, 1 Cox, C. C. 6. R. v. Taylor, 3 Cox, C. C. 84. R. v. Mooney, 5 Cox, C. C. 318. R. v. Cleary, 2 F. & F. 850.

(d) R. v. Bonner, 6 C. & P. 386, John's case, *post*, p. 391.

(e) Greenl. Ev. 189. 1 Phill. Ev. 285. In Woodcock's case, 1 Leach, 500, the declarations were made forty-eight hours before the death. In Tinkler's case, 1 East, P. C. 354, some of them were made ten days before the death. In R. v. Mosley, R. & M. C. C. R. 97, they were made eleven days before the death. In R. v. Bonner, 6 C. & P. 386, they were made three days before death; and were all received. In R. v. Van Butchell, *infra*, they were made seven days before the death and rejected. See R. v. Bernadotti, 11 Cox, C. C. 316. In Craven's case, 1 Lew. 77, a person who had been confined to his bed for weeks, said to the surgeon, 'I am afraid, doctor, I shall never get better,' and shortly afterwards died. Hullock, B., held that an account given by the deceased to the doctor after this declaration was receivable as a dying declaration, although several weeks before his death, and stated that the subject had been lately before the judges, and his mind was made up about it.

as to the belief of the declarant at the time of making the declaration and it is immaterial that he afterwards took a more hopeful view of his condition. (f)

Any hope of recovery, however slight, existing in the mind at the time of the declarations made, will render the declarations inadmissible. (g)

In *R. v. Van Butchell*, (h) Hullock, B., said, 'The principle on which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall ultimately "never recover," but still that would not be sufficient to dispense with an oath. "There must be a settled hopeless expectation of immediate death."' (i)

On a trial for murder, it appeared that the declaration of the murdered woman was taken by the magistrate's clerk on the night of the 17th of October. She was then breathing with considerable difficulty. She had been thrown into a river the night before, but was rescued in an exhausted condition. She continued ill and in great danger, and during the day had desired that some one should pray with her. In answer to the magistrate's clerk she said she thought she was likely to die. She was sworn, and before her declaration was completed, in answer again to the magistrate's clerk, she said that she had the fear of death before her, and had no present hope of recovery. The declaration was put into writing and read over to her, and she was asked to correct any mistake; it was written down: 'I have made the above statement with the fear of death before me, and with no hope of my recovery.' She then said, 'No hope at present of my recovery.' The clerk thereupon inserted the words 'at present.' She died the next morning. The declaration was admitted in evidence at the trial. Held, that, under the above circumstances, the declaration so taken was inadmissible, inasmuch as the conduct and acts of the deceased rendered it at least doubtful whether she was under an unqualified belief that death was immediately impending and absolutely devoid of hope of recovery; and the conviction was quashed. (j)

Where a constable stated, 'From appearances I should judge that the deceased was dying. He was making his statement to me about a quarter of an hour. I believe he knew he was dying. I cannot recollect that he said anything about dying before he began his statement. As he finished, he said, "Oh God! I am going fast; I am too far gone to say any more."' The deceased died a few hours afterwards of a wound in the abdomen that penetrated the stomach. Cresswell, J., having consulted Williams, J., said, 'My Brother

(f) *R. v. Hubbard*, 14 Cox, C. C. 565.

(g) *R. v. Welbourn*, 1 East, P. C. c. 5, s. 124, p. 358. *R. v. Crockett*, 4 C. & P. 544. *R. v. Christie*, Carr. Supp. 202. *R. v. Hayward*, 6 C. & P. 157. *Wilson's case*, 1 Lew. 78. *Errington's case*, 2 Lew. 148. *Simpson's case*, 1 Lew. 78. *R. v. Spilsbury*, 7 C. & P. 187. *R. v. Megson*, 9 C. & P. 418. *R. v. Fagent*, 7 C. & P. 238.

(h) 3 C. & P. 629.

(i) Per Lush, L. J., *R. v. Osman*, 15

Cox, C. C. 1; per Charles, J., *R. v. Gloster*, 16 Cox, C. C. 471.

(j) *R. v. Jenkins*, 38 L. J. M. C. 82, *et per Kelly*, C. B. 'The judge must be perfectly satisfied beyond a reasonable doubt that the declarant was under the belief that no hope of recovery existed. *R. v. Qualter*, 6 Cox, C. C. 357. *R. v. Smith*, 16 Cox, C. C. 171. And if he is so it is admissible. *R. v. Goddard*, 15 Cox, C. C. 7.

Williams confirms the doubts I had on this subject; that it being possible the man did not discover the extent of his weakness till he had made the statement, and that it was only after he had made it he for the first time discovered that he was going fast; there is not, consequently, that clear ascertainment of his consciousness of his state, before he made it, to render it admissible.' (k)

In order to render a statement admissible as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death; but there is no necessity that such apprehension should be of death in a certain number of hours or days. The question turns rather on the state of the person's mind at the time of making the declaration than upon the interval between the declaration and the death. (l) Where, therefore, the deceased made a declaration on the 23rd of October, concluding, 'I have made this statement believing I shall not recover,' and at that time the deceased was in a state, from the injuries that he had received, from which it was impossible that he could recover. His spine was broken, so that death must speedily follow, and he died on the 3rd of November; and the doubt as to the admissibility of the declaration was raised by a witness, who proved that, shortly before the deceased made the statement, he asked him how he was, and the deceased answered, 'I have seen the surgeon to-day, and he has given me some little hope that I am better; but I do not myself think I shall *ultimately* recover;' and that before he left the room, on the same occasion, the deceased said that *he could not recover*; but it was held on a case reserved, that the declaration had been properly admitted. The deceased was so injured, his *status* was such that he could not possibly recover, and his own opinion was that he could not recover; and in a case like this, where there was an injury to the spine, he was probably a more competent judge of his state than the doctor, he had no hope, though the doctor had held out hopes, and before the witness left the room he said that he could not recover. That was his own opinion of his case, and the impression on his mind was that death was impending. (m)

It is not necessary that the deceased should *express* any apprehension of danger; for his consciousness of approaching death may be inferred, not only from his declaring that he knows his danger, but from the nature of the wound, or state of illness or other circumstances of the case. And if it may reasonably be inferred from the nature of the wound, the state of illness and other circumstances, that the deceased was sensible of his danger, his declarations are admissible. (n)

(k) *R. v. Nicolas*, 6 Cox, C. C. 120. The statement was, however, afterwards received, the counsel for the prisoner withdrawing his objection to it.

(l) Per Pollock, C. B., *R. v. Reaney*, *infra*.

(m) *R. v. Reaney*, D. & B. 151. Wightman, J., said, 'The statement must have been made under an impression upon the mind of the person making it that his death was about to happen shortly, or, to use the expression found in the books, that his death

was impending: that, however, is a relative term, and does not, of course, import merely an expectation that the sufferer would die at some time—for that is the debt which we all owe to nature—but it means an expectation that he is about to die shortly of the disease or injuries under which he is then suffering; that, in other words, he is without a reasonable or any hope of recovery.' 7 Cox, C. C. 209.

(n) John's case, 1 East, P. C. c. 5, s. 124, p. 357, by the decision of all the judges in

A surgeon found a transverse wound across the throat of the deceased, which had passed through the trachea, and the point of the instrument had reached the vertebræ. Three days afterwards she stated to the surgeon that she did not think she should recover. He considered her in danger, but had a hope she would recover. To the nurse who attended her, she had repeated several times, both before and after the surgeon had seen her, that she should die. The nurse told her she thought she would get better. She said she thought she would, if the surgeon could see in her throat as he could see on her hands. This she said many times, and all day she said she should get better if it was not for her throat. The surgeon spoke cheerfully to her, and she appeared cheerful after that, and in better spirits. She got a little better, and was easier after the surgeon dressed the wounds. A magistrate saw her, and told her of her condition, and that she was in very great danger. He repeated two or three times, in various forms, something of the same kind — that she was likely to die; that she might die; and added, ‘I hope it may please Almighty God to bring you round, but I believe you are in great danger. I think it very possible this will end fatally with you. I am come to hear you, and whatever you say, should you die, will be produced in evidence on the trial of the prisoner. You must therefore tell me the truth, and nothing but the truth, without any fear or reserve.’ She said nothing. He then said, ‘It would be a very sad and awful thing for you to go into the presence of your Maker, having told me anything, in your present situation, which is false.’ From her not having said anything to him, he told her he should administer an oath to her, which he did, and by means of questions to her he got her to tell him, and what she said was reduced into writing, and read over to her; and he then said to her, ‘Now that is perfectly true, and the whole truth?’ and she said, ‘It is.’ She then put her mark to it. It was objected that this declaration was not made spontaneously, and not under a sense of immediate and impending death; but it was held that it must be taken on the whole that the statement was spontaneous, and that, looking at her state, and at her expressions, there was not the slightest hope in her mind of recovery. (o)

All the judges agreed at a conference in Easter Term, 1790, that it ought not to be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge before he receives the evidence. (p) And where on a trial for murder in Ireland a dying declaration was tendered in evidence, and the judge left it to the jury to say whether the deceased knew when he made it that he was at the point of death, the question as to the propriety of the course adopted in that case was sent over for the

1790. Woodcock's case, 1 Leach, 500. Dingle's case, 2 Leach, 561. R. v. Bonner, 6 C. & P. 386, Patteson, J. R. v. Perkins, 2 Moo. C. C. R. 135. R. v. Morgan, 14 Cox, C. C. 337. R. v. Bedingfield, 14 Cox, C. C. 341.

(o) R. v. Whitworth, 1 F. & F. 382. Watson, B., who refused to reserve the point, and the prisoner was executed.

(p) John's case, 1 East, P. C. c. 5, s. 124, p. 357. Welbourn's case, *ibid.* 358, S. P., resolved by all the judges in Mich. Term, 1792. R. v. Hucks, 1 Stark. N. P. C. 523. R. v. Smith, 10 Cox, C. C. 82, what the declaration is, is for the jury, S. C. per Channell, B.

opinion of the English judges, who answered that the course taken was not the right one, and that the judge ought to have decided the question himself. (g) And such has been the uniform practice in all the recent cases.<sup>1</sup>

The circumstances, under which the declarations were made, are to be shewn to the judge, and he will hear all that the deceased has said relative to his situation, and will inquire into the state of illness in which he was; the opinions of medical and other persons as to his state, and whether they were made known to the deceased; the conduct of the deceased in settling his affairs; in making his will; giving directions as to his funeral or family; and whether he had recourse to those consolations and rites of religion which are appropriate to the last sad hours of departing mortality; in a word, into every fact and circumstance which may tend to throw light upon the state of mind of the deceased at the time when the declaration was made, in order the better to enable him to arrive at a satisfactory determination as to whether the evidence be admissible or not. (r)

It is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (s) In the case of *R. v. Hutchinson*, (t) tried before Bayley, J., the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry. And so where the prisoner was indicted for using instruments to procure the miscarriage of a woman, her dying declaration was held inadmissible. (u)

But where two persons died from the same act of poisoning, the declaration of one was held admissible on the trial of the prisoner for the murder of the other. On an indictment for poisoning King, it appeared that the poison was administered in a cake, which the deceased ate for breakfast; immediately after which he was taken ill, and his maid servant, who was present, and had made the cake, said that she was not afraid of it, and thereupon ate of it, and was in

(g) Major Campbell's case, as stated by Parke, B., in 11 M. & W. 486.

(r) See *R. v. Van Butchell*, ante, p. 390, per Bolland, B. *R. v. Spilsbury*, 7 C. & P. 187, per Coleridge, J.

(s) By Abbott, C. J., *R. v. Mead*, 2 B. & C. 605. In trials for robbery the dying declarations of the party robbed were held inadmissible by Bayley, J., on the Northern Spring Circuit, 1822, and by Best, J., on the Midland Spring Circuit, 1822. And in *R. v. Lloyd*, 4 C. & P. 233, by Bolland, B.,

and in rape. *R. v. Newton*, 1 F. & F. 641, by Hill, J. Drummond's case, 1 Leach, 337, where it was ruled that the dying declaration of a convict at the moment of execution was not evidence. See the observations of the Court of Exchequer in *Stobart v. Dryden*, 1 M. & W. 615, which render it at least very doubtful whether dying declarations would at the present day be admissible in any civil suit. 1 Phil. Ev. 280.

(t) 2 B. & C. 608, in note to *R. v. Mead*.

(u) *R. v. Hind*, Bell, C. C. 253.

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<sup>1</sup> See *Smith v. S.*, 9 Humph. 9. *S. v. Tilghmann*, 11 Ired. 513. *C. v. Casey*, 11 Cush. (Mass.) 417.

consequence poisoned and died. Her dying declarations (made after she knew of her master's death, and was conscious of her own approaching death) as to the manner in which she had made the cake, and that she had put nothing bad in it, and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to, on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of inquiry at the trial; and the preceding case was relied upon. But Coltman, J., after consulting Parke, B., expressed himself of opinion that, as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury; but he said he would reserve the point for the opinion of the judges. (*v*)

The declarations of the deceased are admissible only as to those things to which he would have been competent to testify, if sworn in the case. They must, therefore, in general speak to facts only, and not to mere matters of opinion, and must be confined to what is relevant to the issue. (*w*)

The dying declaration of an accomplice is admissible; (*x*) but this can only happen where the prisoner is charged with assisting in the self-destruction of the accomplice: for it has already appeared that dying declarations are never admissible, except where the death of the person who made them is the subject of the indictment.

It is no objection to the admission of a dying declaration, that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. Where three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement, taken before a magistrate, was not produced, and a copy of it was rejected. A question then arose, whether the first and third declarations could be received; and Pratt, C. J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted. (*y*)

But if the statement of the deceased was committed to writing, and signed by him at the time it was made, it has been held essential that the writing should be produced if existing, and that neither a copy nor parol evidence of the declaration could be admitted to supply the omission. (*z*) But the decisions on this point are alto-

(*v*) *R. v. Baker*, 2 M. & Rob. 53. The prisoner was acquitted.

(*w*) Greenl. Ev. 190. 1 Phill. Ev. 291. *R. v. Sellers*, Carr. Supp. 233.

(*x*) *Tinkler's case*, 1 East, P. C. 354.

(*y*) *R. v. Reason*, 1 Str. 499. 6 St. Tr. 502. 2 Stark. Evid. 366. According to the report in the State Trials, the Chief Justice

and Powys, J., deemed the evidence inadmissible. At all events, it appears the evidence was received. Sir J. Strange was one of the counsel in the cause.

(*z*) *R. v. Gay*, 7 C. & P. 230, Greenl. Ev. 199. *Trowter's case*, 12 Vin. Abr. 118, 119. *Leach v. Simpson*, in Scac. Pasch. 1839, 1 Law & Eq. Rep. 58.



gether unsatisfactory; for there is no authority, by Act of Parliament or otherwise, for taking a dying declaration in writing, and the words uttered by the deceased are just as much primary evidence as any writing in which they might be incorporated. (a)

If the statement of the deceased has been taken on oath before a magistrate, but is inadmissible as a deposition, in consequence of the prisoner not having been present when it was taken, or for any other reason, (b) it is admissible as a declaration *in articulo mortis*, if taken under such circumstances as would render such a declaration receivable in evidence. (c) And evidence is admissible to prove that the deposition was taken at a time when the deceased was aware of the near approach of death, although the deposition contains no statement to shew that the deceased made it in contemplation of death. (d)

It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the case; though any departure from the mode may affect the value and credibility of the declarations.<sup>1</sup> Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation. (e) Where a surgeon, in a case of murder, was called to prove a dying declaration, and stated that he put questions to the deceased for the purpose of ascertaining whether it would be necessary for a magistrate to come to her house to take her examination, and it was objected that the statement being in answer to questions, and not a connected continuous statement flowing from herself, could not be received; it was held that the declaration was admissible. (f)

But whatever the statement may be, it must be complete in itself; for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received.<sup>1</sup>

The dying declarations of the deceased are not only admissible against a prisoner, but also in his favour. (h)

(a) *R. v. Reason*, *supra*, seems at variance with these cases, and see *Robinson v. Vaughan*, 8 C. & P. 252, and other cases, as to the grounds on which depositions are admissible. See *R. v. Bell*, 5 C. & P. 162, *post*, and the judgment in *R. v. Christopher*, 1 Den. C. C. 536.

(b) *R. v. Clarke*, 2 F. & F. 2.

(c) *R. v. Dingler*, 2 Leach, 561. *R. v. Callaghan*, M'Nally, Ev. 385, Rosc. Cr. Ev. 33. As to the care with which this ought to be done, see *R. v. Mitchell*, 17 Cox, C. C. 503.

(d) *R. v. Hunt*, 2 Cox, C. C. 239. Pollock, C. B., after consulting Coleridge, J.

(e) *R. v. Reason*, 1 Str. 499. *R. v. Woodcock*, 2 Leach, 561, and see *R. v. Welbourn*, *ante*, p. 392. *R. v. Smith*, L. & C. 607. *R. v. Steele*, 12 Cox, C. C. 168.

(f) *R. v. Fagent*, 7 C. & P. 238, Gaselee, J.

(h) *R. v. Scaife*, 1 M. & Rob. 551. See *Drummond's case*, *ante*, p. 393. The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if in favour of the prisoner, there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed almost every case of manslaughter, in which such declarations have been admitted, is an authority to that effect, as the *prima facie* presumption is, that the prisoner had murdered the deceased. And, moreover, a declaration in favour of a prisoner must ever be taken to be more

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<sup>1</sup> See Greenl. Ev. 190, and *Vass v. C.*, 3 Leigh, 786.

As the declarations of a dying man are admitted, on a supposition that in his awful situation on the confines of a future world he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows, that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behaviour in his last moments, or may be allowed to shew that the deceased was not of such a character as was likely to be impressed by a religious sense of his approaching dissolution. (i)

If a child be too young to be capable of having an idea of a future state, his declarations are inadmissible. (j)

But if a child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences, in a future state, of telling a falsehood, his declarations, made under the apprehension and expectation of immediate death, are admissible in evidence. (k)

With respect to the effect of dying declarations, it is to be observed that, though such declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight (l) if clearly and distinctly proved, yet it is always to be recollected that the accused has not had the opportunity of cross-examination — a power quite as essential to the eliciting of *the whole* truth, as the obligation of an oath can be, and without which no statement made on oath, however solemnly administered, is admissible under any other circumstances; and that where the deceased had not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of the persons and to the omission of facts essentially important to the completeness and truth

likely to be true; as it is not probable that a person should make a statement favourable to the person who has inflicted a mortal injury upon him, but rather the contrary. C. S. G.

(i) 1 Phill. Ev. 289. In *R. v. Macarthy*, Gloucester Sum. Ass. 1842, the case on the part of the prosecution was that the prisoner had assaulted the deceased, and that the deceased followed the prisoner along several streets for the purpose of giving him into the custody of the police; and Erskine, J., permitted the counsel for the prisoner to cross-examine the witnesses for the prosecution as to the bad character of

the deceased, in order to shew that the prisoner might have had a reasonable ground for supposing that the deceased followed him for the purpose of robbing him. C. S. G.<sup>1</sup>

(j) *R. v. Pike*, 3 C. & P. 598. J. A. Park, J., after consulting Parke, J. The child in the case was four years old, and it was held that his declaration was inadmissible.

(k) *R. v. Perkins*, 2 Moo. C. C. R. 135. 9 C. & P. 395, S. C. In this case the child was more than ten years old.

(l) See per Coleridge, J., *R. v. Spilbury*, 7 C. & P. 187.

#### AMERICAN NOTE.

<sup>1</sup> See *Goodall v. S.*, 1 Oregon, 333. *Nesbitt v. S.*, 43 Ga. 238.

of the narrative. (*m*) When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, yet they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination. (*n*) It may be added also that the deceased in many cases is labouring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of calm reason, operated upon alone by the awful consciousness that he must almost immediately render an account to an all-knowing Creator.

**Hearsay in proof of public rights.** — Hearsay evidence is also admissible for the purpose of proving public rights, and rights in the nature of public rights. (*o*) Thus in questions concerning the boundary of parishes or manors, traditionary reputation is evidence: (*p*) and the declarations of old persons deceased have been admitted in such cases, although they were parishioners and claimed rights of common on the wastes, which their evidence had a tendency to enlarge. (*q*) But although general reputation is evidence on a question of boundary or custom, yet the tradition of a particular fact (as that turf was dug or a post put down in a particular spot) is not admissible. (*r*)

**Deceased persons making statements against their own interest.** — Declarations or statements made by deceased persons, where they appear to be against their own interests, have in many cases been admitted: as entries in their books charging themselves with the receipt of money on account of a third person, (*s*) or acknowledging the payment of money due to themselves. (*t*) Thus a written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger in which a charge for his attendance was marked as paid, was thought

(*m*) Greenl. Ev. 192. 1 Phill. Ev. 292.

(*n*) Ashton's case, 2 Lew. 147, per Alderson, B. A striking instance of the danger of trusting to statements made after a mortal wound has been inflicted occurred in *R. v. Macarthy*, Gloucester Sum. Ass. 1842. The prisoner was indicted for murder, and the deceased had been stabbed by the prisoner whilst he was pursuing him in order to give him into custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all. C. S. G.

(*o*) 1 Phill. Ev. 238, 241. 1 Stark. Ev. 49. Rosc. Ev. 28.

(*p*) *Nicholls v. Parker*, 14 East, 331, in

note to *Outram v. Morewood*. And it seems that a map made from the representations of a deceased person, who pointed out the boundaries, would be evidence of such boundaries. *R. v. Milton*, 1 C. & K. 58. Erskine, J.

(*q*) *Nicholls v. Parker*. But such declarations must not have been made *post litem motam*, that is, after the very same point or question has become the subject of controversy. *R. v. Cotton*, 3 Campb. 444. 1 Phill. Ev. 260.

(*r*) *Weeks v. Sparke*, 1 M. & S. 680. *Ireland v. Powell*, Peake's Ev. 16, cor. *Chambre, J. Chatfield v. Frier*, 1 Price, 256. 1 Phill. Ev. 245.

(*s*) 1 Phill. Ev. 293. *Middleton v. Melton*, 10 B. & C. 317.

(*t*) *Ibid*.

by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age. (*u*) So where the point in issue was whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses committed on the waste were admitted in evidence, to shew that the right to the soil was in his master, under whom the plaintiff claimed. (*v*) So receipts for rent found in the possession of a tenant are evidence that the person who signed them was seised in fee. (*w*) On the same principle, entries in the books of a tradesman by his deceased shopman, who thereby supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of the goods, or of other matter there stated within his own knowledge. (*x*) But where the effect of the entry is not to charge the servant, it is not evidence. Thus, in an action for the hire of horses, an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, is not evidence. (*y*) Such declarations are admissible only on the ground that they are against the proprietary or pecuniary interest of the party making them, and a declaration is not receivable in evidence, because it would subject the party to a prosecution if he were living. Thus, if A. were indicted for murder, and B., who was dead, had made a declaration that he was present when the murder was committed, though that declaration was against his interest, and would have subjected him to a prosecution if living, yet it would not be admissible after his death. (*z*) Where an entry or declaration is made by a disinterested person in the course of discharging a professional or official duty, it is, in general, admissible after the death of the party making it. Thus, a notice endorsed as served by a deceased clerk in an attorney's office, whose duty it was to serve notices, is evidence of service. (*a*) An entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is evidence of the fact of dishonour, after the clerk's decease. (*b*) And if a declaration be made in the discharge of a duty by a deceased person, it is admissible, whether oral or written. (*c*) In all these cases, the

(*u*) *Higham v. Ridgway*, 10 East, 109. Entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, were held by Abbott, C. J., admissible evidence to shew that A. B. was in the occupation of the premises at the time mentioned. *Doe v. Cartwright*, Ry. & Mood. N. P. C. 62.

(*v*) *Barry v. Bebbington*, 4 T. R. 514.

(*w*) *Doe dem. Blayney v. Savage*, 1 C. & K. 487.

(*x*) 1 Phill. Ev. 319. *Price v. Lord Torrington*, 1 Salk. 285.

(*y*) *Calvert v. Archbishop of Canterbury*, 2 Esp. 646. *Rosc. Ev.* 34. *Webster v. Webster*, 1 F. & F. 401. *Smith v. Blakey*, L. R. 2 Q. B. 326.

(*z*) *The Sussex Peerage case*, 11 Cl. & F. 85, per Lord Lyndhurst, C. In that case a declaration by a clergyman that he had solemnised a marriage, was held not to be admissible, on the ground that it

might have subjected the clergyman to a prosecution for solemnising the marriage. *Standen v. Standen*, Peake, N. P. C. 45, was strongly questioned in this case.

(*a*) *Doe v. Turford*, 3 B. & Ad. 890, *Doe v. Skinner*, 3 Ex. 84. *R. v. Dukinfield*, 11 Q. B. 678. *Price v. Lord Torrington*. 1 Salk. 285. *Sturla v. Freccia*, 5 Ap. Cas. 623.

(*b*) *Poole v. Dicas*, 1 New Cases, 649.

(*c*) Per Lord Campbell, C. J. *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J. Q. B. 5. *The Sussex Peerage case*, 11 Cl. & F. 113. By the Jewish law the custom is that children are circumcised on the eighth day from their birth, and it is the duty of the Chief Rabbi to perform this rite, and make an entry of it in a book; but it has been held that an entry made by a Chief Rabbi of a circumcision is not evidence after his death. *Davis v. Lloyd*, 1 C. & K. 275, Lord Denman, C. J., and Patteson, J.

person who made the entry must be proved to be dead. (*d*) Where it appeared that the entry was in the handwriting of a banker's clerk, who was then in the East Indies, it was held inadmissible. (*e*)

There is a distinction between declarations against interest and declarations made in the discharge of a duty. The former declarations are evidence of all the facts stated; the latter only of the facts which it was the business of the writer to state. (*f*) So entries against interest are evidence whensoever made. The latter entries, in order to be evidence, must generally be contemporaneous with the act done. (*g*)

There are other exceptions to the general rule against the reception of hearsay evidence, such as the admission of declarations in cases of pedigree, and of old leases, rent-rolls, surveys, &c., which can occur so seldom in criminal proceedings, that it is not thought necessary to take further notice of them in this Treatise. (*h*)

(*d*) *Cooper v. Marsden*, 1 Esp. 2 by Lord Kenyon, C. J.

(*e*) *Ibid.* *Stephen v. Gwenap*, 1 M. & Rob. 121.

(*f*) See *Percival v. Nanson*, 7 Ex. 1; 21 L. J. Ex. 1.

(*g*) See *Smith v. Blakey*, L. R. 2 Q. B. 326.

(*h*) See *post*, as to evidence of character.

## CHAPTER THE SECOND.

THE PROOF OF NEGATIVE AVERMENTS, p. 400.—THE RULE THAT THE EVIDENCE MUST BE CONFINED TO THE POINT IN ISSUE, p. 403.—WHAT ALLEGATIONS MUST BE PROVED, AND WHAT MAY BE REJECTED, p. 428;—AND THEREWITH OF SURPLUSAGE AND OF VARIANCE.

### SEC. I.

#### *Of the Proof of Negative Averments.*

It is a general rule of the law of evidence, in criminal as well as in civil proceedings, that it lies on him who asserts the affirmative of a fact to prove it, and not on him who asserts the negative, unless under peculiar circumstances where the rule does not apply. (a) Thus, on an indictment for bigamy, where the first marriage was by licence, and the prisoner appeared to be under age at the time, it was held that it lay on the prosecutor to prove the consent of parents, required by the 26 Geo. 2, c. 33, in order to shew the marriage valid, and not on the prisoner to prove the negative in his defence. (b)

In criminal proceedings, however, where negative averments usually impute a breach of the law to the defendant, the operation of this rule is sometimes counteracted by the presumption of law in favour of innocence; which presumption, making, as it were, a *prima facie* case in the affirmative for the defendant, drives the prosecutor to prove the negative. (c) Thus, on an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proving the negative that he did not deliver them; for a person shall be presumed duly to have executed his office till the contrary appear. (d) On an indictment for obtaining money, &c. under false pretences the prosecutor must prove the averments negating the pretences. In an action for the recovery of penalties under the Hawkers' and Pedlars' Act against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, namely, of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. (e) On the trial of an indictment on the 42 Geo. 3, c. 107, s. 1, which made it

(a) Gilb. Ev. 131. Bull. N. P. 298.

(b) *R. v. Butler*, R. & R. 61. *R. v. Morton*, ib. 19, in note to *R. v. James*, ante. But since the 4 Geo. 4, c. 76, a marriage by a minor without consent is valid. *R. v. Birmingham*, 8 B. & C. 29; 2 M. & R. 230.

(c) The same rule applies in civil proceedings. The principal cases on the sub-

ject are *Monke v. Butler*, 1 Roll. Rep. 83, 3 East, 199. *R. v. Hawkins*, 10 East, 211. *Powell v. Milbank*, 2 W. Bl. 851. S. C. 3 Wils. 355. *Williams v. East India Company*, 3 East, 193. *R. v. Twynning*, 2 B. & A. 386. *Doe v. Whitehead*, 8 A. & E. 571.

(d) Bull. N. P. 298.

(e) 1 Phil. Ev. 494.

felony to course deer on an enclosed ground, 'without the consent of the owner of the deer,' it ought to have appeared from the evidence produced on the part of the prosecution that the owner had not given his consent. (f)

But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate in the manner just mentioned; but the general rule, as above stated, applies, viz. that he who asserts the affirmative is to prove it, and not he who avers the negative.

Thus upon a conviction under the 5 Anne, c. 14, s. 2, against a carrier for having game in his possession, it was held sufficient that the qualifications mentioned in the 22 & 23 Car. 2, c. 25, were negatived in the information and adjudication, without negating them in the evidence. (g) 'The question is,' said Lord Ellenborough, in that case, 'upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information.' (h)

In *R. v. Hanson* (i) the rule was again considered and laid down by the Court of King's Bench. In that case there had been a conviction by two justices for selling ale without an excise licence. The information negatived the defendant's having a licence; but there was no evidence to support this negative averment; the only evidence to support the conviction being that the defendant had in fact sold ale. The question was, whether the informer was bound to give evidence to negative the existence of a licence. In support of the conviction it was contended, that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a licence; for it is a rule, both of the civil and the common law, that a man is not bound to prove a negative allegation; *R. v. Turner* was cited as an express authority on the point. Abbott, C. J., 'I am of opinion that the conviction is right. It seems to me that this case is not distinguishable from *R. v. Turner*. It is a general rule that the proof of

(f) *R. v. Rogers*, 2 Campb. 654. See also *R. v. Hazy*, 2 C. & P. 458, and *R. v. Argent*, R. & M. C. C. R. 154, ante, p. 366; the former of which cases was an indictment for lopping and topping an ash tree without the consent of the owner, and the latter an indictment for taking fish out of a pond without the consent of the owner. According to the report of the case of *R. v. Rogers*, Lawrence, J., seems to have thought it necessary to call the owner of the deer for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal. But this decision has been over-

ruled; and it is now established that the non-consent may be inferred from the circumstances under which the act was done or proved by the agents of the owner. *Ante*, p. 366.

(g) *R. v. Turner*, 5 M. & S. 206. See also *Spieries v. Parker*, 1 T. R. 140, and *Jelfs v. Ballard*, 1 B. & P. 468, by Heath, J. In *R. v. Stone*, 1 East, 639, the Court of King's Bench were equally divided on the point.

(h) 5 M. & S. 209.

(i) MS. Paley on Convictions by Dowling, p. 45, n. (1).

the affirmative lies upon the party who is to sustain it. The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *R. v. Turner* all the learned judges concur in that principle. I concur in all the observations upon which the judgment of the Court in that case was founded: and I think every one of them is applicable in principle to this. The general principle, and the justice of the case, are here against the defendant. It is urged, that if we decide against the defendant, we shall open the door to a great deal of inconvenience: that by no means follows; this man might have produced his licence without any possible inconvenience, which would at once have relieved him from all liability to penalties. Probably the whole inquiry before the magistrates was as to the fact of selling the ale, and that nothing was said about the licence; but, however, I think, by the general rule, the informer was not bound to sustain in evidence the negative averment that the defendant had not a licence. I do not mean to say that there may not be cases which may be fit to be considered as exceptions to that general rule; there is no general rule to which there may not be exceptions; all I mean to say is, that this is not one of those exceptions. The party thus called upon to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his licence; whereas, if the case is taken the other way, the informer is put to considerable inconvenience. Discussions may arise before the magistrates, whether the evidence produced is proper to sustain the negative; whether a book should be produced, or an examined copy, and many other questions of that sort; whereas none can arise when the defendant himself produces his licence. This, therefore, not being one of the excepted cases, but a case falling directly within the general rule, I am of opinion that judgment must be given for the Crown.' (j)

In *Willis's case* it is said to have been agreed that, although an indictment states that the prisoner 'then or at any time before, not being a contractor with or authorised by the principal officers or commissioners of our said Lord the King of the navy, ordnance, &c., for the use of our said Lord the King, to make any stores of war, &c.,' yet that it is not incumbent on the prosecutors to prove this negative averment, but that the defendant must shew, if the truth be so, that he is within the exception in the statute. (k)

Upon the same principle, the *Apothecaries' Company v. Bentley* (l) was decided. That was an action for a penalty on the 55 Geo. 3, c. 194, for practising as an apothecary without having obtained the certificate required by that Act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary, &c., 'without having obtained such certificate as by the said Act is directed.' No evidence was offered by the plaintiffs to shew that the defendant had not obtained his certificate. The plaintiffs having

(j) So in *R. v. Smith*, 3 Burr. 1475, which was a conviction for trading as a hawker and pedlar without a licence, it was held that the onus of proving the licence lay on the defendant.

(k) 1 Hawk. P. C. c. 89, s. 17. Vol. ii. p. 507.

(l) Ry. & Mood. N. P. C. 159. S. C. 1 C. & P. 538.



closed their case, the counsel for the defendant submitted that there must be a nonsuit. But Abbott, C. J., said, 'I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative, the plaintiffs are not bound to prove it, but that it rests with the defendant to establish his having a certificate.' (m)

## SEC. II.

*Evidence confined to the Point in Issue.*<sup>1</sup>

No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule, that the evidence is to be confined to the point in issue; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule, that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. Therefore, it is not allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Thus, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time, and with another person, and that he has a tendency to such practices, ought not to be received in evidence. (n) Where upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed, it was proposed to abandon the charge of burglary, and to give evidence of a larceny by the prisoners of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused to receive the evidence, on the ground that it was a distinct transaction. (o) The prisoners were, therefore, acquitted on this charge, but were afterwards indicted again for the other offence, and convicted. In treason, no overt act, amounting to a distinct independent charge, though falling under the same head of treason,

(m) See *R. v. Harris*, 10 Cox, C. C. 541.

(n) *R. v. Cole*, Mich. T. 1810, by all the judges, MS. 1 Phil. Ev. 477. In an action against the acceptor of a bill of exchange, where the defence was, that the acceptance was forged, evidence that the

party who negotiated the bill had been guilty of other forgeries was held inadmissible. *Viney v. Barss*, 1 Esp. 292. See also *Balcetti v. Serani*, Peake, N. P. C. 142. *Graft v. Bertie*, Peake's Ev. 104.

(o) *R. v. Vandercomb*, 2 Leach, 708. Vol. ii. p. 48.

## AMERICAN NOTE.

<sup>1</sup> See *Dyson v. S.*, 26 Miss. 362. *Hudson v. S.*, 3 Cold. 355. *Lightfoot v. P.*, 16 Mich. 507.

shall be given in evidence, unless it be expressly laid in the indictment; (*p*) but still, if it conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts. (*q*) With this view the declarations of the prisoner and seditious language used by him are clearly admissible in evidence, as explaining his conduct and shewing the nature and object of the conspiracy. (*r*)

So, though it is not allowable in general to inquire into any other stealing of goods, besides that specified in the indictment, yet, for the purpose of ascertaining the identity of the person, it is often important to shew that other goods, which had been upon an adjoining part of the premises, were stolen in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material. (*s*) Thus also, on an indictment for the crime of arson, it may be shewn that property, which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner. (*t*)

Where several are proved to have been engaged in the same design, the acts and declarations of one in furtherance of that design may be received in evidence against another, though not present; (*u*) and it seems to make no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations evidence against another any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted. (*v*) Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention would be evidence against the rest. (*w*) So where in a case of forgery several persons had been shewn to be connected together in respect of the charge contained in the indictment, it was held that what was said by one of them to a witness, when they were met together, on the subject of the present forgery, was evidence against the others, although the person who said it was not upon his trial. (*x*)

Where several different felonies are alleged in the same indictment, or the evidence appears to refer to more than one distinct unconnected felony, it is usual for the judge, in his discretion, to

(*p*) Fost. 245.

(*q*) Ibid.

(*r*) 1 Phil. Ev. 471, citing *R. v. Watson*, 2 Stark. 134.

(*s*) 1 Phil. Ev. 169, 7th ed. See per Littledale, J., in *R. v. Rooney*, 7 C. & P. 517, *post*, p. 408, note (*n*).

(*t*) Rickman's case, 2 East, P. C. c. 21, s. 11, p. 1035.

(*u*) *R. v. Stone*, 6 T. R. 527. See also for examples of this rule, *R. v. Standley*, R. & R. 305. *R. v. Gogerley*, *ibid.* 343. *R. v. Bingley*, *ibid.* 446.

(*v*) 2 Stark. Ev. 329.

(*w*) Ibid.

(*x*) *R. v. Stansfield*, 1 Lew. 118, Littledale, J. See *R. v. Tattersall*, *post*, p. 413, note (*o*).

call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge. (y) Thus, on an indictment against a receiver for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election, (z) though on an indictment for stealing several articles it is no ground for confining the prosecutor's proof to some one of the articles, that they might have been, and probably were, stolen at different times, if they might have been stolen all at once. (a) Where an indictment contains two counts, one charging the prisoner with felony, and the second with being an accessory after the fact to the same felony, and very different evidence was required to support each count, Cockburn, C. J., held that the prosecution must elect on which count they would proceed. (b)

Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to shew the character of the other. (c) On an indictment for stealing six shillings, it was proved that the prisoner was a shopman in the employ of the prosecutrix, and, his honesty being suspected, on a particular day the son of the prosecutrix put seven shillings, one half-crown, and one sixpence, marked in a particular manner, into a till in the shop, in which there was no other silver at that time, and the prisoner was watched by the prosecutrix's son, who from time to time went in and out of the shop, occasionally looking into and examining the till, while customers came into the shop and purchased goods. Upon the first examination of the till it contained 11s. 6d.; after that, the son of the prosecutrix received one shilling from a customer and put it into the till; afterwards another person paid one shilling to the prisoner, who was observed to go with it to the till, to put his hand in, and withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The till was examined by the witness, and 11s. 6d. were found in it instead of 13s. 6d. which ought to have been there. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when Wilde, Sergt., objected that evidence of one felony had already been given, and that the prosecutrix ought not to be allowed to prove several felonies. The learned judge overruled the objection, and the son of the prosecutrix proved that, upon each of several inspections of the till after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been found guilty, application was made to the Court of King's Bench for a rule for staying the judgment, on the ground that the prosecutor ought to have been confined in proof to one felony; but the Court was of opinion that it was in the discre-

(y) *Young v. R.*, 3 T. R. 106, by Buller, J. *R. v. Jones*, 3 Campb. 132. *R. v. Kingston*, 8 East, 41. But this rule does not extend to misdemeanors. *R. v. Finacane*, 5 C. & P. 551.

(z) *R. v. Dunn*, R. & M. C. C. R., 146. When he will not be so, see vol. ii. p. 293.

(a) *Ibid.* When the prosecutor will not be required to elect when goods have been taken at different times, see vol. ii. pp. 282, 293.

(b) *R. v. Brannon*, 14 Cox, C. C. 394.

(c) *Per Bayley, J. R. v. Ellis*, 6 B. & C. 145.

tion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction. (*d*)

So where on an indictment for stealing pork, a bowl, some knives, and a loaf of bread, it appeared that the prisoner entered a shop and ran away with the pork, and returned in about two minutes, replaced the pork in a bowl, which contained the knives, and took away the whole together; in about half-an-hour after, he came back to the shop, and took away the loaf of bread. Littledale, J., said, 'This taking away the loaf cannot be given in evidence upon this indictment. I think that the prisoner's taking the pork and returning in two minutes, and then running off with the bowl, must be taken to be one continuing transaction; but I think that half-an-hour is too long a period to admit of that construction. The taking of the loaf therefore is a distinct offence.' (*e*) So where the prisoner was indicted for stealing a halfpenny, and the prosecutor had marked a quantity of pence and halfpence and locked them up in a bureau, and had missed one halfpenny on the 9th of July, and others on the 13th; Erle, J., held that the prosecutor might prove that after the 13th the prisoner was searched, and all the marked pence found upon her, and that he could not say which of them was stolen on the 9th, but it must be one of them; for it mattered not that the evidence might apply to another charge if it were relevant and necessary for the support of this charge. (*f*)

The prisoner was indicted for stealing one shilling. The prisoner was taken into custody, and the shilling, which had been marked, found in his possession, and the constable asked him if he had any more of the prosecutor's money about him, on which he produced some half-crowns, and said something about them; and it was held that the statement so made was not admissible, as it related to another felony. (*g*)

In the case of *R. v. Wylie*, (*h*) Lord Ellenborough said he remembered a case where a man committed three burglaries in one night; he took a shirt at one place and left it at another; and they were all so connected, that the Court went through the history of the three different burglaries. So where two burglaries were committed in the town of Uttoxeter, one at Keeling's and another at Bladon's, between twelve and three o'clock of the same night, and at Bladon's a crowbar was found, which fitted some marks on a chest broken open at Keeling's, and which was proved to have been in the possession of the prisoners previously to the night in question; Wightman, J., on the authority of the preceding case, allowed evidence to be given of the finding of the crowbar at Bladon's, and also of the finding goods stolen the same night from Bladon's in the possession of the prisoners, as such evidence tended to shew that the prisoners had been at Bladon's, and that they might have left the crowbar there. (*i*) So

(*d*) *R. v. Ellis*, *supra*. The indictment had been removed into that Court by *certiorari* from the city Court of Exeter.

(*e*) *R. v. Birdseye*, 4 C. & P. 386.

(*f*) *R. v. May*, 1 Cox, C. C. 236. Erle, J., told the jury to convict, if they were

satisfied that all the halfpence were identified, but to acquit if any was not identified.

(*g*) *R. v. Butler*, 2 C. & K. 221, Platt, B.

(*h*) 1 New Rep. 94, S. C. 2 Leach, 983.

(*i*) *R. v. Stonyer and others*, Stafford Sum. Ass. 1843. MSS. C. S. G.

where on an indictment for breaking into a counting house of the Midland Railway Station at Nether Whitacre, it was proposed to prove that the prisoners on the same night had successively broken into the stations of Wilnecote, Kingsbury, Nether Whitacre, and Forgemills, Nether Whitacre being at some distance from the other stations, and that some of the property taken from Nether Whitacre had been found on two of the prisoners, and property taken from another station on the third, and that jemmies had been found on each prisoner, which corresponded with marks on doors and drawers broken open at one or other of the stations; Bramwell, B., said, 'I think that evidence of the acts of the prisoners during the same night is admissible in order to explain why none of the property taken from Nether Whitacre was found upon one of the prisoners. If it is proved that he was found in possession of other property stolen from another station on the same night, that, with other circumstances, might be evidence that all the men had been engaged in each burglary, and that the third man had received his share of the booty wholly from what was taken from the other stations. The events of that night, relating to these burglaries, are so intermixed that it is impossible to separate them.' (j)

Where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them. Thus upon an indictment against two prisoners, charging each in different counts as principals in the first degree in committing a rape, and also as principals in the second degree in other counts, evidence has been held admissible that the prisoners, together with three other men, committed at the same place and time, the one after the other successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn. (k) So where there were three indictments against the prisoner for setting fire to three ricks belonging to three different persons, and it appeared that the ricks, which were in sight of each other, were set on fire one immediately after the other, but the strongest evidence being as to the last, that indictment was tried first; the confession of the prisoner relating to all the three ricks, and the evidence of an accomplice as to all, was admitted, as the whole constituted part of the same transaction. (l) And where an indictment for arson contained five counts for setting fire to five different houses, which were all in one row, and the fire from the one first on fire had communicated to the others, it was held that, as it was all one transaction, the evidence as to all the houses was admissible. (m) So where upon an indictment against the prisoners for robbing Woodward, there being another indictment against them for robbing Urwick of a watch, it appeared that Woodward and Urwick were travelling in a gig, when they were stopped and robbed; Littledale, J., held that evidence

(j) *R. v. Cobden*, 3 F. & F. 833.

(k) *R. v. Folkes*, R. & M. C. C. R. 354. And the same was held in *R. v. Lea*, 2 Moo. C. C. R. 9. 7 C. & P. 836. There several rapes committed in one boat were given in evidence; but other rapes committed in another boat, to which the prosecutrix was carried from the first boat, were not offered

in evidence, as they were the subject of another indictment. C. S. G.

(l) *R. v. Long*, 6 C. & P. 179, Gurney, B.

(m) *R. v. Trueman*, 8 C. & P. 727. Erskine, J., refused to put the prosecutor to elect as to which count he would proceed with.

might be given that Urwick lost his watch at the same time and place that Woodward was robbed, but that evidence was not admissible of the violence that was offered to Urwick. One question in the case was, whether the prisoners were at the place in question when Woodward was robbed; and as proof that they were so, evidence was admissible that one of them had got something which was lost there at that time. (n) And where upon an indictment for robbing George and Henry Pritchard, it appeared that the prisoners attacked and robbed George and Henry Pritchard when they were walking together, Tindal, C. J., held that the prosecutor was not bound to elect as to which robbery he would proceed. It was all one act, and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time, and there was no interval of time between the assaulting and robbing of the one and the assaulting and the robbing of the other. If there had been, the felonies would have been distinct, but that was not so in the present case. (o) So where the prisoner was indicted under the 8 & 9 Will. 3, c. 26, s. 1, for having in his possession an edger, contrived for marking money round the edges, and proof being offered that the prisoner had used this instrument for graining the edges of counterfeit half-crowns, it was objected that the act of coining being a species of treason higher in degree than the one the prisoner was charged with, the greater offence ought not to be given in evidence to prove the less; but Burrough, J., held that the evidence was admissible, as whatever went to prove that the prisoner was guilty of the offence he was charged with was evidence, however it might also go to shew him guilty of another offence. (p)

The prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 37, for stealing from the mine of H. J. Gunning, coal, the property of H. J. G., and in the same count he was charged with stealing from the mines of thirty other proprietors other coal, the property of each of such proprietors. (q) The prisoner had been lessee of a mine, which he had been working from November, 1842, till January, 1848, and in opening the case it was stated that he had, from the shaft opened to work this mine, carried on extensive workings of coals by means of levels, driftways, tunnels, cuttings, and drains; and by means of these workings he had gotten coal belonging to about forty different proprietors, without their sanction or knowledge; and in doing so had undermined part of the yard of the parish church, 144 yards of the main street of Wigan, and 220 private houses; and he had unlawfully possessed himself of £10,000 worth of the coal of

(n) *R. v. Rooney*, 7 C. & P. 517. Little-dale, J., added, 'I think it makes no difference that Urwick's watch is the subject of another indictment.' 'Suppose Mr. Urwick had not been there at all, and that when Woodward was robbed a watch had been under the seat of his gig, and that after the robbery he had discovered that the watch was missing, I have no doubt that evidence might be given of the loss of the watch at the place.'

(o) *R. v. Giddins*, C. & M. 634.

(p) *R. v. Moore*, 2 C. & P. 235. *R. v. Zeigert*, 10 Cox, C. C. 555.

(q) There were other counts charging the prisoner with the severing of coal with intent to steal, and with common larceny; and in each count the coal was laid as the property of H. J. G., and of the said thirty other separate and distinct owners. *Quære*, whether all the counts, except those for common larceny, were not clearly bad, as charging thirty-one separate felonies, which by no possibility could be committed together? C. S. G.

other persons. It was urged that it was not competent to proceed under this indictment for felonies so entirely distinct. One of such felonies might have been committed upwards of four years before another of them, and by means of different workmen, and under the superintendence of different agents. Each severance of coal being a felony, there were thirty-one distinct felonies charged in each count, and if no restriction were put on the prosecution, there would be laid before the jury, and the prisoner would have to answer, evidence relating to many thousands of distinct felonies. What would be an unanswerable defence to one charge, might be wholly inapplicable to another, and every defence might require a different set of witnesses. Erle, J., 'The question is, what, in such a case as this, is one entire transaction. It may be that the making a level, a tunnel, a drain, and a cutting, may all be necessary in order to take particular coal; if so, all would, I think, be part of one transaction, and might properly be given in evidence. I cannot interfere at present.' The evidence for the prosecution extended to all the operations mentioned in the opening of the case; to the getting the coal continuously during a period for upwards of four years, to operations conducted by different underlookers and by many different workmen, and to coals taken from the coal fields of thirty or forty different owners. On the case for the prosecution closing, the counsel for the prisoner urged that the prosecutor ought to elect some single charge; which he declined, unless directed so to do. Erle, J., 'I will not so direct; but for convenience sake the prisoner's counsel may address himself to the charge of stealing the coal taken under the churchyard. The whole workings may be relied on to shew a felonious intent, though they may go into twenty different counties, and into the separate properties of twenty different persons, and extend over fifteen or twenty years, if the mining operations be continuous for that time;' and in summing up, Erle, J., said, 'It has been urged that the taking of each day was a separate felony, and that only one felony could be inquired into by you on this indictment; but I should say that as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people. As, however, complaint was made by the counsel for the prisoner, I have thought it better that your attention should be confined to the charge of taking the coal of one owner; but in order to shew that when the prisoner took the coal of Mr. Gunning he knew he was out of his boundary, I have permitted it to be proved that he has gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal.' (r)

Upon an indictment against a son for stealing on the 20th of November, 1843, twenty-six pairs of boots, twenty pairs of shoes, and 128 pounds weight of leather, and against his father for receiving the said goods, knowing them to have been stolen, it appeared that the son from the beginning of March, 1843, till the 10th of November following was in the employ of the prosecutors, who were curriers and dealers in boots and shoes. The two prisoners lived together

at Kirkstall till the end of April ; when the elder removed to Preston, taking with him a hamper, which passed and repassed afterwards repeatedly between the father and the son down to October. On the 10th of November the lodgings of the son at Kirkstall were searched, and a quantity of shoes and leather found there belonging to the prosecutors, and at the same time and place sundry letters were found from the father to the son, which induced the prosecutors to search the shop of the father at Preston, and in that shop there were also found boots, shoes, and leather of the prosecutors, of the value of about £150, and letters from the son to the father. It was proposed, on the part of the prosecution, to put in the letters, both from the father to the son and from the son to the father ; these letters were dated at various periods between May and October following, and referred to the transmission from the son to the father of goods of the nature of those found in the father's house. It was objected that these letters could not be read, or at any rate not all of them. As they referred continually to the transmission of property, the effect of giving them in evidence would be to assist the proof of a single felony by proof of other felonies. It was answered that it did not appear that there had been more than one taking and one receiving ; and at all events the letters were evidence against the father, as shewing guilty knowledge. Maule, J., 'Judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where, as will often be the case, the effect of so doing will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place. The whole seems to constitute a continuous transaction ; therefore I shall admit evidence relating to any takings and receivings under the circumstances, provided the indictment contains corresponding charges.' (s)

It was formerly considered that if there were separate indictments for offences which constituted parts of the same transaction, evidence of an offence which was the subject-matter of one indictment was not admissible upon the trial of another. (t) But it has been since held in several cases that the fact that there is another indictment pending makes no difference. (u) And it has been laid down by a very learned judge that the correct rule in such cases is, that it is in the discretion of the judge to admit or reject evidence of other felonies which form the subject of other indictments, and that such discretion will be guided by the evidence appearing to be necessary or unnecessary in support of the indictment on which the prisoner is being tried. (v) Thus where there were three indictments against a prisoner for stealing notes from three letters, and it appeared that the prisoner stole notes out of one letter, and then opened another letter, and took out of it the notes it contained, and substituted for them notes to an equal amount out of the first letter, it was held on

(s) *R. v. Hinley*, 2 M. & Rob. 524. See *R. v. Firth*, 38 L. J. M. C. 54.

(t) *R. v. Smith*, 2 C. & P. 633.

(u) See the cases, vol. ii. p. 676, and per

*Littledale, J., R. v. Rooney*, *ante*, p. 408. See *R. v. Zeigert*, 10 Cox, C. C. 555.

(v) Per *Patteson, J., R. v. Salisbury*, MS. C. S. G. S. C. 5 C. & P. 155.



the trial for stealing the notes out of the first letter that the notes stolen out of the second letter might be traced to the prisoner, because such evidence was essential to the chain of facts necessary to make out the case. (w) But where on an indictment for night-poaching, in order to prove the identity of one of the prisoners, it was proposed to prove that a coat lost by one of the keepers on the occasion in question had been found in the house of that prisoner, there being a separate indictment for stealing the coat; Patteson, J., refused to receive the evidence, unless the prosecutor consented to an acquittal on the indictment for larceny. (x)

**Evidence of other acts of prisoner as proof of his guilty knowledge.**—Where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offences committed by him, though not charged in the indictment, is admissible for that purpose. ‘Although it is not competent for the prosecutor to adduce evidence, tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried; on the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused.’ (y) Thus upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to shew his knowledge of the forgery; (z) but not on an indictment for forgery. (a) So on a prosecution for uttering coun-

(w) *R. v. Salisbury, supra.*

(x) *R. v. Westwood*, 4 C. & P. 547. In *R. v. Salisbury, supra*, Patteson, J., stated that he refused to admit the evidence in this case on the ground that he did not think it necessary in support of the offence charged.

(y) Per Lord Halsbury, *Makin v. Att.-Gen. for N. S. W.* (1894), A. C. 57.

(z) See *Wylie's case*, 1 New Rep. 92. S. C. 2 Leach, 983, where per Lord Ellenborough, C. J. ‘The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances as to leave no doubt that the prisoners must have known what sort of paper they were passing.’ *R. v. Ball, Russ. & Ry.* 132. 1 Campb. 324. *R. v. Francis*, 12 Cox, C. C. 612. *R. v. Green*, 3 C. & K. 209. So the possession of other forged instruments may be proved as evidence of a guilty knowl-

edge. *R. v. Hough*, R. & R. 120; but there must be regular proof that they are forged, vol. ii. p. 676. *R. v. Millard, R. & R.* 245. It seems that it may be proved that the prisoner had uttered forged bills or notes of a different kind, vol. ii. p. 677. As to the proof of an uttering the subject of another indictment to shew a guilty knowledge, see vol. ii. p. 679.

(a) Where, in an action on several bills of exchange drawn by one Skull, the question was whether the defendant had accepted them, and his name appeared on each as acceptor, and evidence was given for the plaintiff that the signatures were those of the defendant, and for the defendant that the signatures were forgeries, and the defendant proposed to prove that a number of bills and other papers had been taken away by the plaintiff's brother from Skull's house, and that among the bills so taken away were several bills on which the defendant's signature appeared, which signature was forged; and that the plaintiff had been circulating such forged bills since; and it was contended that the jury would be at liberty to infer that the bills on which the action was brought were

terfeit money, it is the practice, for the purpose of shewing a guilty knowledge, to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. (*b*) So, though on an indictment against a receiver for receiving several stolen articles, if it be proved that they were received at several times, the prosecutor may be put to his election, yet evidence may be given of all the receipts for the purpose of proving guilty knowledge. (*c*)

On an information against a publican for unlawfully permitting prostitutes to assemble in his house, evidence that some of the same prostitutes had on other previous occasions been in the house is admissible, in order to prove his knowledge of their character. (*d*)

On an indictment for obtaining money on a chain by falsely pretending that it was a silver chain, it was held admissible to prove that the prisoner, a few days afterwards, offered a chain similar in appearance to another pawnbroker, requesting him to advance ten shillings upon it, and that twenty-six similar chains were found on the prisoner when he was apprehended. (*e*)

On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals; it was held that evidence was admissible of a false pretence on a prior occasion to another person that a chain was gold, whereas it was plated, and on another distinct occasion that a ring was of diamonds, which it was not; and that it was no objection that the diamond ring spoken to on the prior occasion was not produced in court. (*f*)

If it be material to shew the intent with which the act charged was done, evidence may be given of a distinct offence not laid in the indictment. Thus upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person. (*g*) So on an indictment for arson of a house, previous attempts to set it on fire have been held admissible, though not proved to have been made by the prisoner, for the purpose of shewing that the fire was not accidental. (*h*) So on an indictment for setting fire to a rick by discharging a gun very near to it, evidence is admissible that it had been on fire the day before, and that the prisoner was then near it with a gun in his hand. (*i*) So where upon an indictment for robbery it appeared that the prisoners went with a mob to the prosecutor's house, and one of the mob went up to him,

part of the bills so taken from Skull's house; Tindal, C. J., rejected the evidence, and it was held that he was right in so doing, as it clearly would have been inadmissible on an indictment for forgery. *Griffiths v. Payne*, 11 A. & E. 131.

(*b*) Vol. i. p. 241, and see *R. v. Jarvis*, Dears. C. C. 552, vol. i. p. 242, and *R. v. Weeks*, L. & C. 18. *R. v. Foster*, 24 L. J. M. C. 134. *R. v. Goodwin*, 10 Cox, C. C. 534.

(*c*) *R. v. Dunn*, R. & M. C. C. R. 146. *R. v. Oddy*, 2 Den. C. C. 264. See how 34

& 35 Vict. c. 112, s. 19, noticed vol. ii. p. 440.

(*d*) *Parker v. Green*, 2 B. & S. 299.

(*e*) *R. v. Roebuck*, D. & B. 24.

(*f*) *R. v. Francis*, 43 L. J. M. C. 97.

See *R. v. Holt*, Bell, C. C. 280.

(*g*) *R. v. Voke*, R. & R. 531.

(*h*) *R. v. Bailey*, 2 Cox, C. C. 311, Pollock, C. B.; and see *R. v. Taylor*, 5 Cox, C. C. 138.

(*i*) *R. v. Dossett*, 2 C. & K. 306, Maule, J. See *R. v. Harris*, 4 F. & F. 342. Wills on Circumstantial Ev. 47. *R. v. Garner*, 4 F. & F. 346.

and very civilly, and, as the prosecutor then believed, with a good intention, advised him to give them something to get rid of them, and prevent mischief, upon which the prosecutor gave them the money laid in the indictment; it was held that for the purpose of shewing that this was not *bond fide* advice, but, in reality, a mere mode of robbing the prosecutor, evidence was admissible of other demands of money made by the same mob at other houses, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present. (j) So upon an indictment for administering sulphuric acid to horses with intent to kill them, it has been held that the prosecutor is not confined to the proof of a single act of administering, but that other acts of administering may be given in evidence to shew whether it was done with the intent charged in the indictment. (k) So where upon an indictment for robbing the prosecutor of his coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, Holroyd, J., received evidence of a second ineffectual attempt to obtain a £1 note the following evening by similar threats, and upon a case reserved the judges were of opinion that the evidence was admissible to shew that the prisoner was guilty of the former transaction. (l) On a prosecution for a libel, the publication of other libels by the defendant, not laid in the indictment, may be given in evidence, to shew *quo animo* the defendant published that in question. (m) On the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased. (n) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or any of them separately, shortly before the offence, may be given in evidence to shew the confederacy and common purpose, although such acts constitute distinct felonies. (o) On an indictment for sending a threatening letter, prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence, as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (p)

(j) *R. v. Winkworth*, 4 C. & P. 444, Parke, J. Alderson, J., and Vaughan, B., and Lord Tenterden, C. J., afterwards concurred in opinion.

(k) *R. v. Mogg*, 4 C. & P. 364, J. A. Park, J.

(l) *R. v. Egerton*, R. & R. 375, S. C., mentioned by Holroyd, J., in *R. v. Ellis*, ante, p. 405.

(m) Vol. i. p. 643. *Stuart v. Lovell*, 2 Stark. N. P. C. 95. So subsequent letters relating to the same subject, although libellous themselves, are admissible in an action for a libel, and although such libel needs no explanation. *Pearson v. Lemaitre*, 5 M. & Gr. 700.

(n) 1 Phil. Ev. 476. So the declarations of the prisoner, and the seditious language used by him, are clearly admissible in evidence on an indictment for high treason, explaining his conduct, and shew-

ing the nature and object of the conspiracy. *R. v. Watson*, 2 Stark. N. P. C. 134. 1 Phil. Ev. 471. On a trial for murder, Cresswell and Williams, JJ., were rather inclined to reject evidence of what the prisoner had done to the deceased ten days before the cause of death, no declaration accompanying the act: neither the evidence proposed to be given nor the cause of death is stated. The objection was that the act done could have no tendency to shew subsequent intention. *R. v. Mobbs*, 6 Cox. C. C. 223. In many cases evidence of previous violence has been given in cases of murder without objection, and such evidence clearly tends to prove ill-will.

(o) *R. v. Tattersall*, MS. Bayley, J. Vol. i. p. 162.

(p) *Robinson's case*, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110.

Evidence of the murder of one person may be given upon the trial for the murder of another person, if such evidence tends to shew that the prisoner might have had a motive arising out of the other murder for committing the murder with which he is charged. Upon an indictment for the murder of one Hemmings, it was opened that great enmity subsisted between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give £50 to have him shot, and that the rector was shot by Hemmings, and that the persons who had employed him, fearing they should be discovered as having hired him to murder the rector, had themselves murdered Hemmings; and that Hemmings's bones had been found in a barn occupied by the prisoner at the time of the murders. After evidence had been given of declarations of the prisoner, shewing that he entertained malice against the rector, it was proposed to shew that Hemmings was the person by whom the rector was murdered; it was objected that this was not admissible, as the rector's death was not the subject of the present inquiry. Littledale, J., 'I think that I must receive the evidence. On the part of the prosecution it is put thus — that the prisoner and others employed Hemmings to murder Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings, to prevent a discovery of their own guilt; now, to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker.' (q)

Upon an indictment for murder by poisoning with arsenic, on the 3rd of November, 1816, evidence was given, without objection, that on the 19th of October previously the deceased drank tea with the prisoner, upon which occasion she was seized with sickness and much indisposed; and that on the 3rd of November she again drank tea with the prisoner, and was afterwards taken ill in the same manner, but more violently than before. (r) So on an indictment for murder by prussic acid, administered in porter on the 1st of January, evidence was given, without objection, that in September previously the prisoner had visited the deceased and sent for some porter, and that after the prisoner left the deceased was very sick and ill. (s)

If a person were charged with having wilfully poisoned another, and it was a question whether he knew a certain white powder to be arsenic, evidence would be admissible to shew that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony. (t)

The prisoner was indicted for the murder of her husband, Richard Geering, in September, 1848, by arsenic. She was also charged in three other indictments with the murder of her son George by arsenic in December, 1848, of her son James by arsenic in March, 1849, and of an attempt to murder her son Benjamin by arsenic in April, 1849. (u) On the part of the prosecution evidence was tendered of a

(q) *R. v. Clewes*, 4 C. & P. 221.

(r) *R. v. Donnell*, 2 C. & K. 308, note, Abbott, J.

(s) *R. v. Tawell*, 2 C. & K. 309, note, Parke, B.

(t) *R. v. Dossett*, 2 C. & K. 306, per Maule, J.

(u) Benjamin had stated to the surgeon who attended him, that his symptoms were precisely the same as those exhibited by his father and his two brothers, and this statement had been reduced into writing, and read over to the prisoner, and she said, 'It is quite right.'

*post-mortem* analysis of the intestines, of the contents of the stomach, heart, &c., of Richard, James, and George, and also of a medical analysis of the vomit of Benjamin, who was still alive, in order to shew that arsenic had been taken into the stomach of the three latter persons; that two of them had died of poison, and that the symptoms of all the four were the same. Evidence was also tendered that the four, during their lives, lived with the prisoner, and formed part of her family; that she generally made tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. It was objected that the facts proposed to be proved took place after the death of the husband, and that the effect of them was to shew that the three cases of poisoning were felonious. (v) It was answered that the evidence was admissible in order to prove, not that the prisoner had feloniously poisoned the deceased, but that the deceased had in fact died of poison administered by some one; and, secondly, for the purpose of proving that the death of the husband was not accidental. Pollock, C. B., 'I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to shew that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony.' (w)

The prisoner and his wife were indicted for the murder of his mother by poison. The prisoner's former wife died in March, 1861, and his present wife was then their servant. The prisoner's mother lived with him after his second marriage, and died in December, 1861. He sold arsenic for agricultural purposes, and there was evidence of administration by the prisoners of articles of food in which arsenic might be contained, and of arsenical symptoms following. There was, however, evidence that three horses, one of them belonging to the male prisoner, had been accidentally poisoned by arsenic, and that some of his customers, against whom he was not supposed to have any ill-feeling, had suffered from arsenical symptoms, evidently

(v) It was conceded that the evidence would have been admissible had the deaths taken place *previously* to the death of the husband.

(w) R. v. Geering, 18 Law, J. (N. S.) M. C. 215. Pollock, C. B., who consulted Alderson, B., and Talfourd, J., and they agreed with him in opinion, and therefore the point was not reserved. The prisoner was executed. The C. B. spoke as if the third son had died whenever he mentioned the number of deaths. Upon the trial of a prisoner for the murder of her infant

by suffocation in bed, held, that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not shew the causes from which those children died. R. v. Roden, 12 Cox, C. C. 630. R. v. Cotton, 12 Cox, C. C. 400. So where the prisoners were charged with using a quill for the purpose of procuring abortion, evidence of similar acts of the prisoners on other women both previous to and subsequent to the offence charged were admitted. R. v. Dale, 16 Cox, C. C. 703.

arising from some accident; and it was held that, in order to prove that the administration of the poison to the mother was wilful, evidence was admissible of the circumstances which attended the death of the first wife, and to shew that she had died of arsenic. (x)

The prisoner was indicted for the murder of Ann James, the keeper of an eating-house, of which the prisoner was the manager. She had had living with her Mrs. Townsend, William, Thomas, and Martin Townsend, and was visited by Jane Cafferata and her husband. Between September and the February following Mrs. Townsend, William, and Thomas Townsend, successively sickened and died, after very short illnesses, which in each case exhibited exactly similar symptoms. In February Mrs. James, who had long been ill, became worse, and so continued until June, when she died, and, on examination of her body, traces of a sufficient quantity of antimony to have caused death were found. The other bodies were examined, and all found to be saturated with antimony. Evidence given before the magistrate established in his opinion a *prima facie* case as to all four deaths against the prisoner. The prosecution proposed to give evidence of the three other deaths — 1st, to exclude the supposition of accidental poisoning in the present case; 2nd, to shew that the prisoner had then antimony in his possession, but this could only be done by proving that he administered *something* to two of them, and that antimony was found in them, and that they died of it; 3rd, in order to exculpate Mrs. Cafferata, whom the prisoner charged with poisoning Mrs. James, it was material to prove that she could not possibly have poisoned one of the other three; 4th, as it would be competent to the prisoner to prove that when all the others sickened and died he was absent and could not have poisoned them, so evidence might be given to prove that the prisoner poisoned the whole, from the four crimes being so connected as to be substantially but one transaction. With reference to the present question it was answered — 1st, that the evidence would not exclude the supposition of accident in Mrs. James's case; if the three others were wilfully poisoned by some one it would not prove as against the prisoner that Mrs. James's death was not accidental; 2nd, that the mere fact of '*something*' being administered by the prisoner, and of antimony being found in the bodies, did not prove possession by the prisoner of antimony at the time of Mrs. James's death; the '*something*' might have been exhausted by the three former poisonings; 3rd, that evidence to exculpate Mrs. Cafferata was wholly collateral, unless the prisoner attempted to prove her guilt; 4th, that the prisoner could not prove that he did not poison the three others. Martin, B., after consulting Wilde, B., refused to admit the evidence. (y)

(x) *R. v. Garner*, 3 F. & F. 681, 4 F. & F. 346. Willes, J., after consulting Pollock, C. B.

(y) *R. v. Winslow*, 8 Cox, C. C. 397. The proposed evidence is not stated. This case is opposed to all the preceding cases, none of which were cited. At most it can only be taken to shew that the learned judges in their discretion did not think fit to admit the evidence. With the utmost

deference to their opinion, it seems to have been the very case in which the evidence ought to have been admitted; for it would have most effectually tended to shew that the opinion of the medical men that the particular death was caused by poison, and that that poison was antimony, was correct. It would also have strongly tended to prove that the antimony was not taken accidentally. C. S. G. Lord Halsbury in *Makin*

But on an indictment for the murder by poison of S., Lush, J., admitted evidence of the previous and subsequent deaths of J. and L., under like circumstances, and from similar symptoms, to shew that the poisoning was not accidental; and it being proved that a motive for the death of S. might exist from the fact of the prisoner having insured the life of S. in a Benefit Society, Lush, J., also admitted evidence to shew that there might be an equal motive for the deaths of J. and L., by shewing that they also had been insured by the prisoner. (z)

So evidence may be given of other wounds inflicted by the prisoner on other persons at the same time and place for the purpose of identifying the instrument used. (a) On an indictment for maliciously stabbing it appeared that the prisoner stabbed both the prosecutor and Redman at the same time and place, and it was held that evidence might be given of the shape of the wound inflicted upon Redman for the purpose of identifying the instrument with which the wound was inflicted on the prosecutor. (b) Where on a trial for murder it appeared that three grenades had been exploded, by one of which the deceased was killed, it was held that evidence of the nature of the wounds inflicted at the same time on other persons, who were killed or wounded, was admissible for the purposes of shewing the character of the grenades, which were the first instruments of the kind which had been used. (c)

On the trial for the murder of an infant, it was proved that the prisoners had alleged that they had received only one child to nurse before, and had given it back to its parents, and that they would take the child, with whose murder they were charged, and would adopt it as their own for the payment of £3. Evidence was admitted to shew that several other infants had been received by the prisoners on like representations, and upon payment of sums inadequate for their support for any long period, and also that the bodies of several infants had been found buried in a similar manner to that of the infant in question in the gardens of other houses which had been occupied by the prisoners. On appeal it was held that this evidence was relevant to the issue and was rightly admitted. (d) The principle seems to be that evidence which tends to shew that the prisoner has been guilty of criminal acts other than those charged in the indictment is only admissible either on the issue whether the acts charged were designed or accidental, or to rebut a defence otherwise open to the prisoner.

On an indictment for embezzlement where the entries of sums were correct, but the castings up incorrect, a series of similar errors in casting up, both previously and subsequently to the cases to which the indictment referred, were held admissible in

v. Att.-Gen. of N. S. W. (1894), A. C. 57, points out that Martin, B., was consulted by and agreed with Willes, J., in admitting the evidence in *R. v. Gray*, 4 F. & F. 1102, and the decision cannot therefore be treated as of much importance.

(z) *R. v. Heeson*, 14 Cox, C. C. 40. See also *R. v. Flannagan*, 15 Cox, C. C. 403, where Brett, J., took a similar course.

(a) *R. v. Crickmer*, 16 Cox, C. C. 701.

(b) *R. v. Fursey*, 6 C. & P. 81, Parke and Gaselee, JJ.

(c) *R. v. Bernard*, 1 F. & F. 240, Lord Campbell, C. J., Pollock, C. B., Erle and Cresswell, JJ.

(d) *Makin v. Att.-Gen. of N. S. W.* (1894), A. C. 57, per Lords Herschell, Watson, Halsbury, Ashbourne, Macnaghten, Morris, and Shand.

order to negative the defence that these were merely accidental errors. (*e*)

Upon a trial for arson with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted for the purpose of shewing that the fire which formed the subject of the trial was the result of design and not of accident. (*f*) On an indictment for arson, one count laying an intent to defraud, and it being opened for the prosecution that the motive might have been to realise the money insured by the prisoner upon her goods, evidence was received that she was in easy circumstances, with a view to shew that she was, at all events, under no pecuniary temptation to commit such an act. (*g*)

Where on a trial for rape it was elicited on cross-examination that the act had not caused any pain, Rolfe, B., held that it might be proved on re-examination that the prisoner had done the same thing on previous occasions; for that evidence tended to explain the fact that the act in question had not caused any pain. (*h*)

On an indictment for robbery the defence was an alibi, and in order to shew that the prisoner was near the place of the robbery at the time it was committed, Alderson, B., held that a witness might be examined to shew not merely that he had been accosted by the prisoner on the road shortly before the prosecutor was robbed, but that he had also been in fact robbed by the party who accosted him. (*i*)

In December, 1889, four men named J. Shaw, W. Shaw, Williamson, and Smith were convicted of an assault on a police constable named Eley and sentenced to penal servitude. In April, 1890, four other men named J. Dytche, H. Dytche, Tunncliffe, and Burton were indicted for the same offence. Eley and a man named Sparks who had been with him on the occasion in question, adhered to their former evidence that the convicts, the two Shaws, Williamson, and Smith were the four men who had committed the assault. Counsel for the prosecution proposed to call these convicts to prove that they were innocent. Hawkins, J., after consideration admitted the evidence, holding that it was relevant to the charge then under inquiry. (*j*)

On an indictment for abusing a child under the age of ten years, the first occasion spoken to by the child was a Thursday morning, on which the prisoner threatened to beat her if she told, and it was held that evidence of subsequent perpetrations of the offence on Saturday and Monday was admissible. Willes, J., 'The practice is, no doubt, in the discretion of the Court, to call on the prosecution to elect, but that is a course never taken where the acts are all in substance part of the same transaction; and here, in my opinion, it is so. It has repeatedly appeared to me, in cases of this sort, that the man, by a threat of violence, deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to

(*e*) *R. v. Richardson*, 2 F. & F. 343.  
See *R. v. Balls*, 40 L. J. M. C. 148.

(*f*) *R. v. Gray*, 4 F. & F. 1102.

(*g*) *R. v. Grant*, 4 F. & F. 322.

(*h*) *R. v. Chambers*, 3 Cox, C. C. 92.

(*i*) *R. v. Briggs*, 2 M. & Rob. 199.

(*j*) *R. v. Dytche*, 17 Cox, C. C. 39.



me to give a continuity to the transaction, which makes such evidence properly admissible.' (k)

As other acts and declarations of the prisoner, besides those charged in the indictment, may be given in evidence on the part of the prosecution, so he himself in his defence may in some cases prove other acts and declarations of his own, as evidence of his innocence. Thus on a charge of murder, expressions of good-will and acts of kindness on the part of the prisoner towards the deceased are always considered important evidence, as shewing what was his general disposition towards the deceased, from which the jury may be led to conclude that his intention could not have been what the charge imputes. (l) So in the case of *R. v. Lambert*, (m) where the supposed libel, which was the subject of prosecution, was contained in a paragraph of a newspaper, of which the defendants were the printer and proprietor, Lord Ellenborough, C. J., held that the defendants had a right to have read in evidence any other paragraph in the same newspaper connected with the subject of the passage charged as libellous (although disjointed from it by extraneous matter, and printed in a different character) for the purpose of shewing the intention and mind of the defendants with respect to the specific paragraph laid in the indictment. And as in trials for conspiracies, whatever the prisoner may have done or said at any meeting alleged to be held in pursuance of the conspiracy is admissible in evidence against him on the part of the prosecution, so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved on his behalf; for the intention and design of the party at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. (n) In the case of *Walker* and others, who were tried for a conspiracy to overthrow the Government, and evidence was produced, on the part of the prosecution, to shew that the conspiracy existed, and was brought into overt act at meetings in the presence of Walker, the counsel for the prisoners was allowed to ask a witness whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject. The question was opposed, but held by Heath, J., to be admissible. The prisoner's counsel were also allowed in the same case to inquire into the general declarations of the prisoner at these meetings, whether the witness had heard him say anything that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession. (o)

On the trial of *Hardy* for high treason, where the overt act charged was that the prisoner, for the purpose of accomplishing the treason of compassing the King's death, did conspire with others to call a convention of the people, in order that the convention might

(k) *R. v. Reardon*, 4 F. & F. 76.

(l) 1 Phill. Ev. 470.

(m) 2 Campb. 400, and see *Thornton v. Stephen*, 2 M. & Rob. 45. The same was done in *Newton v. Rowe*, Gloucester Spr. Ass. 1843, cor. *Erskine*, J. MSS. C. S. G.

See *Pearson v. Lemaitre*, 5 M. & Gr. 700; *Camfield v. Bird*, 3 C. & K. 56.

(n) 1 Phill. Ev. 478.

(o) *Ibid.* and 23 St. Tr. 1131. See the observations of Alderson, B., in *R. v. Vincent*, 9 C. & P. 91.

depose the King; the counsel for the prisoner were allowed to ask a witness whether, before the time of the convention which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business. (*p*) But the better opinion seems to be that, in order to make such other acts or declarations of the prisoner applicable to his defence, it must be shewn that they are in some way connected with the facts proved against him. (*q*) In the case of *Horne Tooke* and others, however, for high treason, several publications having been given in evidence on the part of the Crown, containing republican doctrines and opinions, the distribution of which had been promoted by the prisoners during the period assigned in the indictment for the existence of the conspiracy, the prisoner was allowed to read in his defence various extracts from works which he had published at a former period of his life; and these the jury were permitted to carry along with them when they retired to consider of their verdict. (*r*) But the propriety of allowing such a defence has been questioned by very high authority. (*s*)

**Evidence of several transactions when cumulative instances are necessary to prove the offence charged.**—It may also happen that, from the nature of the offence charged, it is impossible to confine the evidence to proof of a single transaction. Thus on an indictment against several defendants for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, Lord Ellenborough allowed the prosecutor to prove various instances of their giving false representations of their circumstances; (*t*) observing that the indictment was for a conspiracy to carry on the business of common cheats, and cumulative instances were necessary to prove the offence. The same sort of evidence, said his Lordship, is allowed on an indictment for barratry; (*u*) and in a prosecution for high treason itself, the gravest of all offences.

**Relevancy of evidence.**—The rule is clear and general, that no question can be put which is not relevant to the issue (unless for the purpose of impeaching the credit of a witness); but the applicability of the rule must obviously depend upon the particular circumstances of each individual case, and will not admit of a general demonstra-

(*p*) 24 How. St. Tr. 1097. On an indictment for a conspiracy against the defendant and Brown (who was gone to America) with intent to defraud Sir C. C. of a sum of money advanced by him by way of annuity, some letters between the defendant and Brown were put in evidence on the part of the prosecution, and the defence was that the defendant had been made a dupe by Brown, and was not himself a participator in the fraud, and Lord Tentenden, C. J., held that, under the peculiar circumstances of the case, the whole of the correspondence between the defendant and Brown, on both sides, previously to the time of the execution of the annuity deeds, was admissible, but that all letters subsequent to that time were inadmissible.

*R. v. Whitehead*, 1 C. & P. 67, D. & R. N. P. R. 61. S. C.

(*q*) *R. v. Lambert*, 2 Campb. 400. Lord George Gordon's case, 21 How. St. Tr. 542. *Hanson's case*, 31 How. St. Tr. 4281. 1 Phill. Ev. 480.

(*r*) 1 East, P. C. c. 11, s. 8, p. 61. 25 How. St. Tr. 545.

(*s*) By Lord Ellenborough in *R. v. Lambert*, 2 Campb. 400.

(*t*) *R. v. Roberts*, 1 Campb. 400. But see *R. v. Steel*, C. & Mars. 337, vol. i. p. 536.

(*u*) The prosecutor must, before the trial, give the defendant a note of the particular acts of barratry he intends to prove against him; and will not be at liberty to give evidence of any other. Vol. i. p. 489.

tion. It may, however, be useful to state some criminal cases, where questions as to the relevancy of evidence have arisen and been decided. On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those, employed to disperse the meeting, may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution, as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters at issue. (v) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organised in the same manner, and acting in concert. It would be relevant also to shew, that early on the day of the meeting, in a spot at some distance from the place of meeting (from which very spot a body of men came afterwards to the place of meeting), a great number of persons, so organised, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. (w) Further, it would be relevant, on such trial, to produce in evidence certain resolutions, which had been proposed, by one of the defendants, at a large assembly in another part of the country, very recently held for the same professed object and purpose as were avowed by the meeting in question, that defendant having acted at both meetings as president or chairman; in a question of intention as this is, it is most clearly relevant to shew, against that individual, that, at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. (x)

In cases of treason and felony, it may be proved that articles were found secreted in the prisoner's house, after his apprehension. In *Watson's case*, evidence was admitted that a quantity of pikes had been found secreted in the prisoner's house subsequently to his apprehension. (y) With respect to writings found after the prisoner's apprehension, it appears to have been laid down in *Hardy's case* (z)

(v) *R. v. Hunt*, 3 B. & A. 566, 577. 1 Phill. Ev. 476. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

(w) *Ibid.*

(x) *R. v. Hunt*, 3 B. & A. 566, 577. 1 Phill. Ev. 477. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

(y) 2 Stark. N. P. C. 137. Lord Ellenborough, in giving his opinion on this point, cited a case from recollection, where a butler to a banker at Malton had been taken up upon suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel, who considered the case during the assizes at York; at their

instance, search was made, and in the privy all the plate was found, the plate was produced, and the prisoner was in consequence convicted; he had been separated from the custody of the plate, since he had been confined in York Castle for some time: but no doubt was entertained as to the admissibility of the evidence. *Abbott, C. J.*, also observed, that an assize had scarcely ever occurred where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension. See *R. v. Courvoisier*, 9 C. & P. 362.

(z) 24 How. St. Tr. 452.

that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, ought not to be read against him, unless there was evidence to shew their previous existence; for otherwise there was no evidence that the prisoner was a party to it. And on a prosecution for a conspiracy, it was held that some letters which were directed to the prisoners and intercepted at the post-office after their apprehension, were not admissible in evidence against them, as they had never been in the custody of the prisoners, or in any way adopted by them. (a) So on an indictment for uttering a forged bank note, knowing it to be forged, it was held that a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, could not be read in evidence as proof of his knowledge that the note was forged. (b) But in *Watson's case* (c) it was held that papers found in the lodgings of a conspirator at a period subsequent to the apprehension of the prisoner might be read in evidence, although no absolute proof was given of their previous existence, where strong presumption existed that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers were intimately connected with the objects of the conspiracy as detailed in evidence. (d) Writings found in the prisoner's possession, but not published, if plainly connected with the treasonable design charged, are evidence of such design upon an indictment for treason, though not published. (e) But it seems that, if it be doubtful whether they are so connected, they are not admissible. (f) In *Watson's case*, one of the objections made to the admission of a paper found in the house of a co-conspirator was, that there was no proof that it had been published; and *Sidney's case* was cited: but the Court distinguished that case from the present, and Abbott, J., said that he had always understood the ground of objection in *Sidney's case* was, not that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment, and he referred to 1 *East's P. C.* 119, where it is said, 'Writings plainly applicable to some treasonable design in contemplation are clear and satisfactory evidence of such design, although not published.' If, say Foster and Blackstone, JJ., 'the papers found in Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him.' That was the objection which had constantly been made to the reception of the evidence in *Sidney's case*. The paper there was not only an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. (g)

(a) *R. v. Hevey*, 1 Leach, 237. See *R. v. Cooper*, *post*, p. 423.

(b) *Huet's case*, 2 Leach, 820.

(c) 2 Stark. N. P. C. 140.

(d) A letter found upon the prisoner may be read, but it is no evidence of the facts it states. Thus on an indictment against a person employed in the post-

office for secreting a letter containing a bill of exchange, the contents of the letter, which was found upon him, were held inadmissible to prove that the bill was enclosed in it. *R. v. Plumer*, R. & R. 264.

(e) *R. v. Watson*, 2 Stark. N. P. C. 141.

(f) *Ibid*.

(g) 2 Stark. N. P. C. 147.

So where on a trial for murder committed by the explosion of grenades, it appeared that the grenades had been ordered by Allsop, and, after the apprehension of the prisoner, a letter was found in the prisoner's house, which was in the handwriting of Allsop, and bore a memorandum in the handwriting of the prisoner. It was held that the letter was admissible. It must be assumed to have been in the prisoner's possession, and it must be admitted, not on the ground that the writer of it was a co-conspirator with the prisoner, but on the ground that it was in the prisoner's possession, and that its contents were relevant to the present inquiry. (*h*) But where on an indictment for fitting out a ship to be employed in the slave trade, the prisoner was a merchant in London, and the ship was seized off the coast of Africa, several letters then found on board of her were held inadmissible, as they were not traced in any way to his knowledge. (*i*)

The prisoner inserted an advertisement in a newspaper offering employment to persons who would transmit him one shilling's worth of postage stamps, and giving an address. The advertisement contained false statements, and upon his being apprehended six envelopes addressed to him, and containing a reply to the advertisement, and a shilling's worth of postage stamps were found upon him. 281 other letters, contained in a sealed bag, were produced on the trial by a clerk from the post-office, and on the bag being opened, the letters were taken out and read, and appeared to be addressed to the prisoner replying to his advertisement, and enclosing each one shilling's worth of postage stamps. These 281 letters had been stopped and opened by the post-office authorities before delivery to the prisoner, and had never been in his possession, or their contents brought to his knowledge; nor was there any proof as to their authenticity or otherwise. Held, that they were admissible against the prisoner on an indictment charging him with obtaining and attempting to obtain money by false pretences from four persons other than the writers of the letters. (*j*)

If the papers found in the prisoner's custody be plainly relative to the design charged, they may be read in evidence without any proof of the handwriting being that of the prisoner. (*k*)

On an indictment against a county for not repairing a public bridge, the defendants may shew under the general issue that the

(*h*) *R. v. Bernard*, 1 F. & F. 240, Lord Campbell, C. J., Pollock, C. B., Erle and Cresswell, JJ. The letter alluded to the assassination of the Emperor of the French. But where two prisoners lodged together, and a portmanteau was found in their lodgings, which Rehden said was Hare's, and the prosecutor's invoice of the stolen shawls was found in it, and also a paper folded in the shape of a letter, and endorsed in Rehden's handwriting, 'J. Rehden, private,' and inside this was an inventory of the shawls that had been pawned, but this was not in Rehden's handwriting; it was held that this inventory was not admissible; for *non constat* that the words 'private' and the prisoner's

name might not have been written previously to the writing on the other side. *R. v. Hare*, 3 Cox, C. C. 247. The Common Sergt., after consulting Maule and Wightman, JJ. But *quære* whether, as the portmanteau was in the prisoner's lodgings, they were not both of them in possession of its contents? If the shawls had been in the portmanteau, would they not have been in the possession of both prisoners? C. S. G.

(*i*) *R. v. Zulueta*, 1 C. & K. 215, Maule and Wightman, JJ.

(*j*) *R. v. Cooper*, 1 Q. B. D. 19. 45 L. J. M. C. 15. 13 Cox, C. C. 123.

(*k*) 1 East, P. C. c. 11, s. 56, p. 119.

bridge had been repaired from time to time by private individuals: for one question is, whether the bridge is a public bridge; and upon that question it is material to inquire, by whom and in what manner it had been repaired, with a view of ascertaining whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience. (*l*) It is one medium of proof to shew that the bridge has been repaired by individuals, though that alone would be of very little weight. (*m*)

In a question put by the House of Lords to the judges, in the course of the proceedings in the *Queen's case*, it was assumed that proof of the existence of a conspiracy between the prosecutor and others to suborn witnesses against the accused is a legitimate ground of defence. Abbott, C. J., in delivering their opinion, observed, that the judges understood that such an assumption had been made in the question put to them, and that the House did not ask their opinion on that point; (*n*) from which it may perhaps be inferred, that their Lordships had doubts whether such a defence is allowable.

**Character.** — In criminal proceedings, when the prosecutor is a witness, his character may be attacked in the prisoner's defence, in the same way as is applicable to the impeachment of the credit of witnesses generally. In the particular instance of an indictment for a rape, or for an assault with an intent to commit a rape, evidence is admissible on the part of the prisoner, not merely, as in the case of an ordinary witness, that from her general bad character the prosecutrix ought not to be believed on her oath, but her character as to general chastity may be impeached by general evidence. (*o*) And the prosecutrix may be cross-examined as to particular discreditable transactions, (*p*) and as to her having had connection with the prisoner previously to the alleged rape; (*q*) and if she deny such connection, the prisoner may shew that she has been previously connected with him. (*r*) On an indictment for an indecent assault, as in cases of rape, or attempt to commit rape, the answer of the prosecutrix to questions put to her on cross-examination as to particular acts of connection with persons named to her, other than the prisoner, is final, and the party questioning is bound thereby, and if her answer be a denial the persons named cannot be called to contradict her. (*s*)

In all criminal prosecutions the prisoner is always permitted to call witnesses to speak to his general character, (*t*) who are usually

(*l*) *R. v. (Inhab.) Northamptonshire*, 2 M. & S. 262.

(*m*) 1 Phil. Ev. 170, 7th ed.

(*n*) *The Queen's case*, 2 B. & B. 310.

(*o*) *Ante*, p. 234.

(*p*) *R. v. Barker*, 3 C. & P. 589.

(*q*) *R. v. Martin*, 6 C. & P. 562.

(*r*) *R. v. Aspinall*, 3 Stark. Ev. 952. This case has now been upheld by the Court for Crown Cases Reserved. *R. v. Riley*, 18 Q. B. D. 481.

(*s*) *R. v. Holmes*, 41 L. J. M. C. 12; 12 Cox, C. C. 137. Semble, that the question may be put to her on cross-ex-

amination, but that she is not bound to answer it.

(*t*) Formerly evidence of the prisoner's good character was admitted in capital cases only, *in favorem vitæ*. *R. v. Harris*, 2 St. Tr. 1038. This evidence is now admitted in all prosecutions which subject a man to corporal punishment; but not in actions or informations for penalties, though founded on the fraudulent conduct of the parties. Peake's Ev. 7. The true line of distinction, Eyre, C. B., observed, is this: in a direct prosecution for a crime such evidence is admissible; but where the prose-

examined in his behalf, as to how long they have known him, and what his general character for honesty, humanity, or peaceable conduct (according to the nature of the offence charged) has been during that time. The inquiry ought manifestly to bear some analogy and reference to the nature of the charge against the prisoner. On a charge of stealing it would be irrelevant and absurd to inquire into his loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. (u) The inquiry must also be made with reference to the general character of the prisoner; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part: and, therefore, proof of particular transactions, in which the prisoner may have been concerned, is not admissible. (v)

It is not the practice to cross-examine witnesses to character unless there be some definite charge against the prisoner, to which to cross-examine them. (w) But where a witness for the prisoner having proved that he had known him for some years, and given him a good character, stated, on cross-examination, that he had never heard anything against him; but admitted that he had heard of a robbery, which had taken place in the neighbourhood some years previously; and was then asked, 'Did you ever hear that the prisoner was suspected of having done it?' it was objected that it was not competent to inquire about particular offences imputed to the prisoner. Parke, B., 'The question is not whether the prisoner was guilty of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one. The question may be put.' (x)

As to the course to be pursued where upon the trial of a person for any subsequent offence, he gives evidence of his good character, see Vol. I., p. 72. If a prisoner cross-examines the witnesses for the prosecution as to his character, he 'gives evidence' within the meaning of these sections, and the previous conviction may be proved. (y)

The prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it; and even then the prosecutor cannot examine to particular

cution is not directly for the crime, but for the penalty, it is not. *Attorney-General v. Bowman*, cited 2 B. & P. 582.<sup>1</sup>

(u) 1 Phill. Ev. 469.

(v) *Ibid.* R. v. Rowton, *post*, p. 426.

(w) R. v. Hodgkiss, 7 C. & P. 298, Alderson, B. It sometimes, however, is proper to ascertain from the witnesses

whether they have had sufficient opportunities of knowing the prisoner's character; as whether they have lived near him, or known him down to the time of the commission of the offence. C. S. G.

(x) R. v. Wood, 5 Jurist, 225.

(y) R. v. Gadbury, 8 C. & P. 676. R. v. Shrimpton, 2 Den. C. C. 319.

#### AMERICAN NOTE.

<sup>1</sup> See *Bennett v. S.*, 8 Humph. 118. C. v. Sachet, 22 Pick. 394. *Engaman v. S.*, 2 Cart. 92. C. v. Webster, 5 Cush. 295.

*S. v. Thawley*, 4 Harring. 562. *S. v. Barfield*, 8 Ired. 344. *Schaller v. S.*, 14 Mo. 502.

facts, the general character of the defendant not being put in issue, but coming in collaterally. (z)

If a prisoner on his trial gives evidence that his character is good, it is open for the prosecution, by way of reply, to prove that the prisoner's character is bad — *Martin, B.*, dubitante. Evidence of character must not be evidence of particular facts, but (by all the Court, except *Erle, C. J.*, and *Willes, J.*) must be evidence of general reputation only, having reference to the nature of the charge. On a trial for an indecent assault, where the defendant had given evidence of his good character, a witness called by the prosecution to rebut such evidence, was asked, 'What is the defendant's general character for decency and morality of conduct?' The witness said, 'I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality.' Held, by the majority of the judges, that this answer was not admissible in evidence. (a)

Where on an indictment for stealing a shawl evidence of the prisoner's good character was given, it was held that evidence of stealing another shawl on the same evening was not admissible in answer to the evidence of character. (b)

On the trial of a prisoner for wounding a constable who had arrested him on suspicion of felony, the following questions, in order to assist in showing that there were reasonable grounds for the arrest, was put to the constable on the part of the prosecution, 'What do you know had been the prisoner's previous character?' The answer was, 'I knew the prisoner to be a very bad character.' It was held by the Court that this question ought not to have been put in the examination-in-chief, although it was open to the prisoner to have cross-examined the constable as to the grounds of his suspicion. (c)

(z) *Bull. N. P.* 296, citing *Martyn v. Hind*, *Cowp.* 437. The ordinary course, however, is to ask the witness in cross-examination whether he has not heard that the prisoner has been tried for a particular offence. *R. v. Hodgkiss*, 7 C. & P. 298, *Alderson, B.*

(a) *R. v. Rowton*, 34 L. J. M. C. 57; 10 Cox, C. C. 25. Per *Erle, C. J.*, and *Willes, J.*, a witness's individual opinion respecting the general character and disposition of the prisoner with reference to the charge is admissible, although such witness knows nothing of the prisoner's general reputation. See *R. v. Burt*, 5 Cox, C. C. 284; *R. v. Hughes*, 1 Cox, C. C. 44.

(b) *R. v. Rogan*, 1 Cox, C. C. 291, *Erle, J.*

(c) *R. v. Turberfield*, 34 L. J. M. C. 20, and 10 Cox, C. C. 1. With all deference it is submitted that this decision is erroneous. Every constable is justified in arresting any person whom he has reasonable grounds to suspect of having committed a felony; and in every case where the question arises whether he had such reasonable grounds of suspicion, it is perfectly clear that it is competent to prove

the grounds of such suspicion; otherwise a right to apprehend would exist without the power of justifying the arrest. In civil cases (unless the defendant be authorised to plead the general issue by statute) the grounds of suspicion must be alleged in a plea to an action for the arrest; *Davis v. Russell*, 5 Bing. R. 354; *Hailes v. Marks*, 7 H. & N. 56; and the reason is that, whether there were reasonable grounds of suspicion is a mixed question of law and fact. *West v. Baxendale*, 9 C. B. 141; and as where the grounds of suspicion are alleged in a plea, they must be proved on the trial; so where the general issue is given by statute, they must be proved on the trial, *Davis v. Russell, supra*; and so in a criminal case like the present the grounds of suspicion must be proved, in order that the jury may determine whether in fact the grounds existed, and that the Court may decide, if they did exist, whether they were reasonable grounds. If a witness were asked whether he had reasonable grounds of suspicion, the question would clearly be erroneous; as the answer would be a conclusion of law and fact. In these cases 'the question is on what grounds and



Soon after the passing of the 6 & 7 Will. 4, c. 114, the Act allowing persons indicted for felony to make their defence by counsel or attorney, the judges promulgated, amongst others, the following rule of practice in cases of felony, that, 'if the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be matter for his discretion whether he will use it or not.' (d) And it has been since held in a case of felony that the counsel for the prosecution has in strictness the right to reply on the whole case, (e) and not merely on the evidence to character, (f) although the counsel for the prisoner only calls witnesses to character; but this is not a right which in practice ought to be exercised, except under very special circumstances. (g)

The practice in cases of misdemeanor has uniformly been that when witnesses have been called, on the part of the accused, to character only, and for no other purpose, the counsel for the prosecution has not addressed the jury in reply, (h) but it seems that in strictness the right exists in cases of misdemeanor, though it ought rarely, if ever, to be exercised. (i)

It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual whose

motives the constable acted at the time,' per Burrough, J., *Davis v. Russell*. Now it cannot be doubted that the bad character of the party may form one ground of suspicion: and the ordinary rule applicable to the receipt of evidence of character is that general evidence is alone admissible; but in a case like the present, as both the general character of the party and particular facts might operate on the mind of the constable, it is plain that evidence of both would be admissible. It is obvious too that the general character of the party might be infamous, and yet the constable might himself know nothing of such general character except from what he had been told by others; to limit the question, therefore, to what the constable knew of the prisoner would be to exclude all evidence of his general character, which possibly formed a most material ground

of suspicion. Lastly, evidence of the character or conduct of a prisoner is always admissible in order to shew that the acts of others, especially of officers of justice, are lawful; which is a totally different issue from that raised as to the guilt of the prisoner, though that issue may depend upon the other. C. S. G.

(d) Rules of Practice in cases of felony, promulgated by the judges before the Spring Circuit of 1837. 7 C. & P. 676, *post*, ch. 3, s. 1.

(e) *R. v. Stannard*, 7 C. & P. 673, *Patteson and Williams, JJ.*

(f) *R. v. Whiting*, 7 C. & P. 771, *Bolland, B.*

(g) *R. v. Stannard, supra.*

(h) Per *Patteson, J.*, in *R. v. Stannard*, 7 C. & P. 673.

(i) *R. v. Stannard, supra*, per *Patteson and Williams, JJ.*

character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer. (*j*)

### SEC. III.

*What Allegations must be proved, and what may be rejected.*

In the present section it is proposed to consider, 1st, What allegations in an indictment must be proved to support it, and what may be disregarded in evidence; and, therewith, of the subjects of surplusage, and the divisibility of averments. 2ndly, With what precision those allegations, which cannot be disregarded in evidence, must be proved; and, therewith, of the subject of variance.

1st. What allegations must be proved, and what may be disregarded in evidence. In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward, must be stated upon the indictment; and all these requisite allegations must be satisfied in evidence, and proved as laid. But allegations not essential to such a purpose, which might be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. (*k*) Thus where Pye was convicted upon an indictment, which charged him with robbing Fernyhough *in the dwelling-house* of Aaron Wilday, and it was proved that the robbery was committed in a house, but it did not appear who was the owner of it; on reference to the judges, they all held the conviction proper. (*l*) Upon an indictment on the 8 & 9 Will. 3, c. 26, s. 1, (now repealed) for having a die *made of iron and steel* in possession, without lawful authority, the judges, on a case reserved for their opinion, held that, as it was immaterial to the offence of what the die was made, proof of a die, either of iron or steel, or both, would satisfy this charge. (*m*) So where the indictment was upon the repealed statute 4 Geo. 2, c. 32, 'for stealing so much lead belonging to the Rev. G. C. W., and then and there fixed to a certain building called Hendon Church,' Buller, J., thought the charging the lead to be the property of any one was absurd and repugnant, property (in this respect) being only applicable to personal things; that it should only have been charged to be lead

(*j*) In *R. v. Stannard*, 7 C. & P. 673, Patteson, J., said, 'I cannot in principle make any distinction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty; the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case.' And per Williams, J., 'It is evidence to be

submitted to the jury, to induce them to say whether they think it likely that a person with such a character would have committed the offence.'

(*k*) *R. v. Holt*, 2 Leach, 593. 5 T. R. 446. 1 Phil. Ev. 498. *Summers' case*, 2 East, P. C. c. 16, s. 168, p. 785. *Wardle's case*, R. & R. 9. S. C. 2 East, P. C. c. 16, s. 168, p. 785.

(*l*) *Pye's case*, 2 East, P. C. c. 16, s. 168, pp. 785, 786. S. P. by all the judges in *Johnstone's case*, *ibid.* See *Minton's case*, 2 East, P. C. c. 21, s. 5, p. 1021.

(*m*) *R. v. Oxford*, R. & R. C. C. R. 382. *R. v. Phillips*, *ibid.* 369.

affixed to the church; and that, therefore, the allegation as to property ought to be rejected as surplusage. (n)

In considering the subject of surplusage, it must always be remembered that it is a most general rule that no allegation, whether necessary or unnecessary, which is *descriptive* of the *identity* of that which is legally essential to the charge in the indictment, can ever be rejected. (o) Thus if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected. (p) So upon an indictment under the 57 Geo. 3, c. 90 (now repealed), for being found armed with intent to destroy game in a certain wood 'called *the old walk* of, and belonging to, and then in the occupation of, John James, Earl of Waldegrave,' it was proved that the wood in question was in the occupation of the Earl of Waldegrave, but it was also proved that the wood had always been called the *long walk*, and had never been called or known by the name of the *old walk*. And upon a case reserved for the opinion of the judges, it was held that, though it is not necessary, where the name of the owner or occupier of the close is stated, to state the name of the close also, yet that the averment could not be rejected, and the variance was fatal. (q) So where the indictment was for breaking, &c., the house of J. Davis, 'with intent to steal the goods of J. Wakelin, in the said house being,' and there was no such person who had goods in the house, but J. W. was put by mistake for J. D., the prisoner was held entitled to an acquittal; and it was ruled that the words 'of J. W.' could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods; and without such words the description of the offence would be incomplete. (r) This is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery. (s) Where an indictment for stealing a bank note described it as *signed by A. Hooper*, for the Governor and Company of the Bank of England, it was held by the judges, on a case reserved, that there could be no conviction without evidence of the signature being by *A. Hooper*. (t)

So the name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed, cannot be rejected as surplusage, but must be proved, both as to Christian and surname, according to the indictment; for if the names there stated are not his real names, or

(n) *R. v. Hickman*, 1 Leach, 318. S. C. 2 East, P. C. c. 16, s. 31, p. 593. On the authority of this case, Holroyd, J., doubted whether, on an indictment on the repealed stat. 3 Will. & M. c. 9, s. 5, for stealing in a lodging let to the prisoner, the allegation of the person *by whom* the lodging was let might not be rejected as surplusage. *R. v. Healey*, R. & M. C. C. R. 1.

(o) 1 Stark. Ev. 628.

(p) 1 Stark. Ev. 374, 2nd ed. So upon an indictment for stealing four *live* tame turkeys, the judges held that the word 'live,' being a description of the quality

of the thing stolen, could not be rejected as surplusage. *R. v. Edwards*, R. & R. 497.

(q) *R. v. Owen*, R. & M. C. C. R. 118. See *Duroure's case*, 1 East, P. C. 415. S. C. 1 Leach, 351; *Pye's case*, and *Johnstone's case*, ante, p. 428.

(r) *Jenk's case*, 2 East, P. C. c. 15, s. 25, p. 514. So also on an indictment for burglary, where the name of the owner of the dwelling-house was misstated, the error was held to be fatal. Vol. ii. p. 44.

(s) Ibid.

(t) *R. v. Craven*, R. & R. 14.

the names by which he is usually known, the prisoner must be acquitted (*u*) unless the indictment be amended under the 14 & 15 Vict. c. 100, s. 1, as it ought to be in such a case. But if there be a sufficient description of the person and degree of the owner of the property, which is supported in evidence, any subsequent addition may, it seems, be rejected as surplusage. Thus where in an indictment for larceny, before the Irish union, the goods stolen were stated to be the property of 'James Hamilton, Esq., *commonly called* Earl of Clanbrassil, in the kingdom of Ireland,' and it appeared in evidence that the prosecutor was an Irish peer, viz., Earl of Clanbrassil, in Ireland, the judges, on a case reserved, were of opinion that, though the correct mode of describing the person of the prosecutor would have been 'James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland,' yet as 'James Hamilton, Esq.' was a sufficient description of his person and degree, the subsequent words, '*commonly called* Earl of Clanbrassil, in the kingdom of Ireland,' might be rejected as surplusage. (*v*)

Although it be true, as above stated, that in order to convict a man of an offence, that offence must be completely averred in the indictment, and the evidence must correspond with, and support, the whole of the material averments; yet it by no means follows that it is necessary to prove the offence charged in the indictment *to the whole extent laid*, for it is fully settled that in criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. (*w*) 'The distinction,'

(*u*) See vol. i. p. 53, *et seq.*, as to variances in respect of the name of the party injured.

(*v*) *R. v. Graham*, 2 Leach, 547. From what is said in the latter part of the opinion of the judges, as delivered by Perryn, B., it is not clear whether their Lordships thought the words stated above should be rejected as surplusage, or only the words '*commonly called*.' Where the prisoner was indicted for stealing goods, the property of Andrew Wm. Gother, Esq., and it appeared that the prosecutor was not an esquire, it was objected that it was a fatal variance; but Burrough, J., overruled the objection, and held that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage. *R. v. Ogilvie*, 2 C. & P. 230. *R. v. Keys*, 2 Cox, C. C. 225, Wilde, C. J., S. P. It has been said, however, that where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and that if he be described as a knight, when in fact he is a baronet, or the contrary, the variance would be fatal; because a name of dignity is not merely an addition but is actually part of the name, Arch. Cr. P. 30.

(*w*) *R. v. Hollingberry*, 4 B. & C. 329. This rule, however, must be understood, as it should seem, with this qualification; that if a prisoner be indicted for murder or felony, he cannot be convicted of a mis-

demeanor, except it be an attempt to commit the offence charged. See vol. i. p. 62. Thus where upon the facts stated upon a special verdict upon an indictment for felony, the Court of King's Bench was of opinion that the prisoner could not be convicted of felony, Lee, C. J., started a question, whether, as the case amounted undoubtedly to a great misdemeanor, they could not give judgment as for a trespass: and the counsel for the Crown, in support of the power of the Court to do so, cited 2 Hawk. P. C. 440, and Cro. Jac. 497. Martin Leaser's case, 1 And. 351. Kel. 29, Dalt. 331. *E contra*, it was insisted that by this means a defendant would be deprived of many advantages; for if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury. The Court ordered the prisoner to be discharged; and said, that in the cases cited *pro Rege*, the judges appear to have been transported with zeal too far. *R. v. Westbeer*, 2 Stra. 1133. S. C. 1 Leach, 12. Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him (which is felony by 24 & 25 Vict. c. 96, s. 42). The jury found them guilty of an assault, but negatived the intent charged. Held, that the prisoners could not, upon this indictment, and finding, be convicted of a common assault. *R. v. Woodhall*, 12 Cox, C. C. 240. Denman, J.

said Lord Ellenborough, in the case of *R. v. Hunt*, (x) 'runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shews that the defendant has committed a substantive crime therein specified.' (y) On a charge of petit treason, if the killing with malice were proved, but no circumstance of aggravation were proved to make the offence treasonable, the prisoner might have been found guilty of the murder. (z) If A. be charged with the murder of B., i. e., with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprised of the nature of it, the verdict enables the Court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts. (a)

On an indictment for burglary and stealing goods, if it appear that no burglary was committed—as where the breaking and entering were not in the night, or on a charge of robbery, where the property was not taken from the person by violence, or by putting in fear—the prisoner may be found guilty of the simple larceny only. (b)

On an indictment for stealing in a dwelling-house, persons being therein, and put in fear, the prisoner may be convicted of simple larceny. (c) And in all complicated larcenies the prisoner may be acquitted of the circumstances of aggravation, as the fear or violence, and found guilty of the simple larceny. (d) So upon an indictment for horse-stealing, which is bad for not describing the animal by any term used in the statute, there may be a conviction for simple larceny. (e) So if a man had been indicted upon the statute of 1 Jac. of stabbing *contra formam statuti*, the jury might acquit him upon the statute, and find him guilty of manslaughter at common law. (f) And if a man had been indicted for stealing goods of the value of ten shillings, the jury might find him guilty only of goods to the value of sixpence, and so guilty only of petit larceny. (g) But in order to convict of any offence which is not the offence primarily charged in the indictment, it is necessary that the minor offence should be substantially charged in the indictment. Thus where an indictment alleged that the prisoners feloniously made an assault on the prosecutor, and feloniously and

(x) 2 Campb. 585.

(y) The same distinction applies to the averments in the indictment. If an offence sufficient to maintain the indictment be well laid, it is enough, though other matters which would increase the offence are ill averred.

(z) Case of Swan and Jefferys, *Fost.* 104. 1 Phil. Ev. 501.

(a) Mackalley's case, 9 Rep. 67 b. Co. Litt. 282 a. Gilb. Ev. 233.

(b) 2 Hale, P. C. 302. 1 Phil. Ev. 501. So where the prisoners were acquitted of the burglary, upon an indictment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the

amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the 12 Anne, c. 7, and the judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. Vol. ii. p. 48. *R. v. Withal*, 1 Leach, 88.

(c) *R. v. Etherington*, 2 Leach, 671. S. C. 2 East, P. C. 685, vol. ii. p. 62.

(d) 2 East, P. C. 784.

(e) *R. v. Beaney*, R. & R. 416.

(f) 2 Hale, P. C. 302.

(g) *Ibid.*

violently did 'rob, steal, take, and carry away from his person certain money and goods,' and the jury found that the prisoners assaulted the prosecutor with intent to rob him, it was held that the conviction could not be sustained, because the indictment contained no statement of an intent to rob. (*h*)

Upon an indictment under 24 & 25 Vict. c. 100, s. 20, for unlawfully and maliciously wounding or inflicting grievous bodily harm, a verdict for a common assault may be returned. (*i*)

If an indictment for treason charge several overt acts, it is sufficient to prove one. (*j*) If the indictment charges, that the defendant did, and caused to be done, a particular act, as 'forged, and caused to be forged,' it is enough to prove either one or the other. (*k*) If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. (*l*) So where the prisoner was indicted for having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendants had published the libel with either of those intentions, they ought to find the prisoner guilty. (*m*) Where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her; and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention charged carnally to know her; Holroyd, J., held that the averment of an assault with intent to abuse simply. (*n*) On an indictment on the 7 Geo. 3, c. 50, s. 1 (now repealed), stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either was held sufficient. (*o*) And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient. (*p*) Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. (*q*) So an indictment for embezzling need not specify the exact sum embezzled; as where the indictment charged the prisoner with embezzling, among other things, notes for one pound each, and evidence was given that there were one pound notes in the sum of money embezzled; this was held to support the indictment. (*r*) Where an

(*h*) *R. v. Reid*, 2 Den. C. C. 88. The 24 & 25 Vict. c. 96, s. 41, vol. ii. p. 78, now authorises a conviction of an assault with intent to rob in such a case.

(*i*) *R. v. Taylor*, 11 Cox, C. C. 261, *et per Kelly*, C. B., although the word assault does not occur in either count of the indictment, yet both counts necessarily include an assault, and both are counts for misdemeanor, and the prisoner having been found guilty of a common assault, we are of opinion that the conviction should be affirmed.

(*j*) *Fost.* 194.

(*k*) By Lord Mansfield in *R. v. Middlehurst*, 1 Burr. 400.

(*l*) *R. v. Hunt*, 2 Campb. 583. *R. v. Williams*, *ibid.* 646.

(*m*) *R. v. Evans*, 3 Stark. N. P. C. 35.

(*n*) *R. v. Dawson*, 3 Stark. N. P. C. 62.

(*o*) *R. v. Ellins*, R. & R. C. C. R. 188. Vol. ii. p. 388. And see *Shaw's case*, *ibid.* p. 389.

(*p*) *Ibid.*

(*q*) *R. v. Hill*, R. & R. 190. Vol. ii. p. 598.

(*r*) *Carson's case*, R. & R. 303. So on an indictment for extortion, alleging that

information for publishing a malicious and seditious libel contained an averment that outrages had been committed *in and in the neighbourhood* of Nottingham; it was held that such averment was divisible, and that it need not be proved that they had been committed in both places. (s). But if it be necessary to state a prescription in an indictment, such prescription must be proved to the whole extent laid, otherwise the consequence might be, that the record would be evidence of a right which had been expressly disproved at the trial. (t)

Where the indictment charges several with a joint offence, any one of them alone may be found guilty. But they cannot be found guilty separately of separate parts of the charge, and if two be so found guilty separately a pardon must be obtained, or *nolle prosequi* entered, as to the one who stands second upon the verdict, before judgment can be given against the other. Thus where Hempstead and Hudson were indicted upon the statute of Anne for stealing in a dwelling-house to the value of £6 10s., and the jury found Hempstead guilty as to part of the articles of the value of £6, and Hudson guilty as to the residue; the judges, upon a case reserved, held that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson it might be given against Hempstead. (u)

2dly. It is to be considered with what precision of proof those allegations, which cannot be disregarded in evidence, must be supported; or, in other words, what is a fatal variance between a material averment in an indictment and the evidence adduced in support of it. The general rule on this subject is, that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. (v)

Upon this principle, where an indictment for the murder of a sergeant at mace of the City of London supposed that the sheriff of London, upon a plaint entered, made a precept to the sergeant at mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any sergeant *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo præcepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance, not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. (w) In an indictment for perjury in an answer to a bill in chancery, the bill was stated to have been filed by A. against B. (the present defendant) and *another*; it appeared in evidence that it was filed against B., C., and D., but the perjury was assigned on a part of the answer, which was material between A. and B.; and Lord Ellenborough held this not to be a fatal variance. (x)

the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. Per Holt, C. J., *R. v. Burdett*, Lord Raym. 149. See also *R. v. Gillham*, 6 T. R. 265. *Serjeant v. Tilbury*, 16 East, 416. *R. v. Hill*, 1 Stark. N. P. C. 369.

(s) *R. v. Sutton*, 4 M. & S. 532.

(t) *R. v. Marquis of Buckingham*, 4 Campb. 189.

(u) *R. v. Hempstead*, R. & R. C. C. R. 344.

(v) 1 East, P. C. c. 5, s. 115, p. 345.

(w) *R. v. Mackally*, 9 Co. 67 a.

(x) *R. v. Benson*, 2 Campb. 508, S. P., by Abbott, C. J. *R. v. Powell*, R. & M. N. P. C. 101.

And with respect to the proof of the offence charged the rule is universal, that it is sufficient if the evidence agree in substance with the averments in the indictment. Thus on an indictment for murder, it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party was killed by a different weapon from that described, it will maintain the indictment, as if a wound or bruise alleged to have been given with a sword be proved to have been given with a staff or axe, or a wound or bruise alleged to have been given with a wooden staff be proved to have been given with a stone. So if the death be laid to have been by one sort of poisoning, and it turn out to have been by another, the difference will not be material. (y) So where the indictment stated that the prisoner assaulted the deceased, and struck and beat him on the head, and then and there gave him divers mortal blows and bruises of which he died; and the evidence was that the prisoner knocked the deceased down by a blow on the head, and that in falling down upon the ground he received the injury which caused his death; the judges, on a case reserved, held that, the cause of death not being truly stated, the prisoner could not be convicted. (z) If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is not a material variance; for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had all together struck the deceased. The identity of the person supposed to have given the stroke, says Foster, J., is but a circumstance, and in this case a very immaterial one. (a)

‘The cases which relate to the necessity of proving particular averments,’ said Chambre, J., in the case of *Turner v. Eyles*, ‘only distinguish between that which is material and that which is impertinent, but make no distinction between that which is inducement, and that which is the immediate cause of action.’ Mr. Starkie, Vol I. Ev. 450, note (l), observes that the distinction between the gist, and that which is the inducement, is not always clear. If by *inducement* such averments only be meant as are not material, but which, if struck out, would leave a valid charge behind, there is no question; but if the term include essential and material averments, then proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon its mere order or connection in point of time, or otherwise, with other mate-

(y) So where an indictment on the 43 Geo. 3, c. 58, s. 2, charged the prisoner with having administered to a woman a decoction of a certain shrub called savin; and it appeared that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub; the medical men who were examined stated that such a preparation is called an *infusion*, and not a decoction (which is made by boiling the substance in the water); upon which the prisoner’s counsel insisted that he was entitled to an acquittal, on the ground that the medi-

cine was mis-described. But Lawrence, J., overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial; that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion. *R. v. Phillips*, 3 Campb. 74.

(z) *R. v. Thompson*, R. & M. C. C. R. 139.

(a) *R. v. Mackally*, 9 Rep. 67 b. Fost. 351. *Smith v. Taylor*, 3 B. & P. 463. *Gwinnet v. Phillip*, 1 N. R. 210.



rial averments. On the other hand, it is certain that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement* or not, or whatever its connection may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered.

But any difference in substance between the statements in the indictment and the evidence, as to the offence charged, will be fatal. Where on an indictment under Lord Ellenborough's Act, the prisoner was charged with *cutting* I. S., and the evidence was that the wounds were inflicted by *stabbing* and not by cutting, the judges held that as the statute used the alternative '*stab or cut*,' the variance was fatal. (b). If, on an indictment for perjury, the oath is stated to have been taken at the assizes, before justices assigned to take the said assizes, it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. (c) In an indictment on the 43 Geo. 3, c. 56, the intent laid was to murder, to disable, or to do some grievous bodily harm; the intent found by the jury was to prevent being apprehended; it was held by the judges, on a case reserved, that a conviction could not be supported. (d)

In the last edition a number of cases were set out in which a variance in the name of a person whose existence was essential to the charge were holden fatal, but such cases have become practically obsolete, as the defect now would be cured by amendment.

**Place.** — On the trial of indictments for offences which are not local in their nature, generally speaking, it will be sufficient to shew that the offence was committed in some place within the county or other division; and a mistake of the place in which an offence is laid will not be material upon the evidence on the plea of not guilty, if the fact be proved at some other place in the same county. (e) Although the offence must be proved to have been committed in the county where the prisoner is tried, yet, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. (f)

And it is no objection in the case of a transitory felony on the plea of not guilty that there is no such place or parish in the county as that in which the offence is stated to have been committed. (g)

(b) *R. v. M'Dermott*, R. & R. C. C. R. 356. *R. v. Plestow*, 1 Campb. 494, Cork's case, 1 Leach, 105.

(c) *R. v. Lincoln*, R. & R. 421. But in an indictment for perjury alleged to have been committed on the trial of a cause before one of the judges of the King's Bench, without a *prout patet per recordum*, it is no variance that the *postea* alleges the trial to have taken place before the Lord Chief Justice, the cause having, in fact, been tried before the judge specified. *R. v. Coppard*, M. & M. 118, Lord Tenterden, C. J. So where the indictment alleged that the cause came on to be tried before

E. W., one of the judges, &c., and it was stated in the *nisi prius* record in the usual form that the cause was tried before the two judges of assize, one of whom was E. W., it was held no variance. *R. v. Alford*, 14 East, R. 218.

(d) *R. v. Duffin*, R. & R. 365.

(e) 2 Hawk. P. C. c. 25, s. 84.

(f) 1 Phil. Ev. 206, 6th ed.

(g) *R. v. Woodward*, MS. Bayley, J. 3 Burn J. D. & Wms. 384, S. C. R. & M. C. C. R. 323. *R. v. Perkins*, 4 C. & P. 363, J. A. Park, J. *R. v. Dowling* R. & M. N. P. R. 433.

Since the 14 & 15 Vict. c. 100, s. 23, it is not necessary to state any venue in the body of an indictment, unless a local description be required. (*h*)

To the above rule, as to the parish and place being immaterial, there are some exceptions; as, if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish laid in the indictment. (*i*)

But if the offence be in its nature local, and there be no such place as that laid in the indictment, the prisoner must be acquitted of such local offence; if, however, the indictment contain a charge of a transitory offence, as larceny, the prisoner may be convicted of such transitory offence, although he is acquitted of the local offence. (*j*) So the offence of stealing in the dwelling-house to the value of five pounds is local, and, therefore, if the house be stated to be situate in a parish and county, it must be proved that the whole of such parish is in such county, and if it be not so proved the prisoner cannot be convicted of stealing in the dwelling-house to the value of five pounds, but he may be of the simple larceny. (*k*)

So on an indictment against a parish for not repairing a highway, on their common law liability to repair, the part of the road out of repair must be proved to be within the parish. (*l*) So it has been held that where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole, for the whole being one entire fact, the local description becomes descriptive of the transitory injury. (*m*)

Proof that the place or parish is usually and commonly known by the description used is sufficient. (*n*) And although there be two parishes of the general name, the general description will be sufficient. (*o*)

But now, whenever any variance occurs between any local de-

(*h*) See the section, vol. i. p. 25.

(*i*) Archb. Cr. Pl. 43. See *R. v. Gloesop*, 4 B. & A. 616.

(*j*) *R. v. Brookes*, C. & M. 543.

(*k*) *R. v. Jackson*, Gloucester Spr. Ass. 1842, MS. C. S. G.

(*l*) Vol. i. p. 812.

(*m*) 1 Stark. Ev. 466, citing *R. v. Cranage*, 1 Salk. 385. In this case the indictment stated that the defendant with others riotously assembled, *et quoddam cubiculum cujusdam S. S., in domo mansionali cujusdam David James fregit et intravit*, and thirty yards of stuff took and carried away; it appeared to be the house of David Jameson; and Parker, C. J., held that this did not maintain the indictment, for part is local and part not local; the *cubiculum* is local, the taking and carrying away is not local; but then all is put together as one entire fact under one description, and you cannot divide them. So if there be an indictment for acting a play and speaking obscene words in such a parish, in a play-house in Lincoln's Inn Fields: if there be no play-house in Lin-

coln's Inn Fields the defendant must be acquitted; for though the words are not local, yet they are made so. One may make a trespass local that is not so. If the speaking had been alleged in Lincoln's Inn Fields, then it had been laid as venue; but here it is otherwise, for here it is alleged as a description where the play-house stood. Per Parker, C. J., *ibid*.

(*n*) 1 Stark. Ev. 468. *Kirtland v. Pounsett*, 1 Taunt. 570. *Goodtitle v. Walter*, 4 Taunt. 671. Per Mansfield, C. J., in *Vowlea v. Miller*, 3 Taunt. 140. *R. v. St. John*, 9 C. & P. 40.

(*o*) 1 Stark. Ev. 469, citing *Doe d. James v. Harris*, 5 M. & S. 326. *Taylor v. Willans*, 3 Bing. R. 449. Where an indictment stated that a highway alleged to be out of repair led to the parish of Langwm, in the county of Monmouth, and it appeared that there were two parishes in the county, Langwm Isha and Langwm Ucha, and that the highway led to the former; *Bosanquet, J.*, held the description sufficient. *R. v. Lantrissent*, Monmouth Sum. Ass. 1832. MSS. C. S. G.

scription and the evidence, the Court may amend the record under the 14 & 15 Vict. c. 100, s. 1.

**Time.**<sup>1</sup> — In criminal prosecutions it is unnecessary to prove the time of committing the offence precisely as laid, unless that particular time is material; and the facts may be proved to have occurred on any day previous to the finding of the bill by the grand jury. (*p*) And now, by the 14 & 15 Vict. c. 100, s. 24, no indictment is insufficient 'for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly,' (*q*) and therefore it seems clear that the particular time need only be proved where time is of the essence of the offence. (*r*)

**Value.** — It is immaterial, in general, whether the value ascribed to property in the indictment be proved or not. By the 14 & 15 Vict. c. 100, s. 24, no indictment is insufficient 'for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value, or price, or the amount of damage, injury, or spoil is not of the essence of the offence;' (*s*) and, therefore, it seems clear that the value, price, or amount need only be proved where it is of the essence of the offence.

As to the old rule, that the want of a *videlicet* would in some cases make an averment material that would not otherwise be so; see 2 Saund. 291 *c.* in note (1) to *Dakin's case*. As a rule, the want of a *videlicet* will never do harm where, from the nature of the case, the precise sum, date, magnitude, or extent is immaterial. (*t*)

Where in an action for a libel contained in a pamphlet, a witness proved that the defendant had given her a pamphlet, and, on a copy being put in her hand, she said, 'This is my handwriting. I believe this to be the pamphlet; it was like it and in this form. I read different portions of it, and lent it to several persons; it was returned to me, and I then wrote this upon it. The defendant has given me different tracts at different times. I cannot swear that this is the same pamphlet he gave me. It is an exact copy, if it is not the same. It is the one I wrote upon. I cannot say I got back the same copy I lent. I only say it is exactly like it. If that is not the copy the defendant gave me, I do not know what has become of it;' it was held that there was some evidence to go to

(*p*) 1 Phil. Ev. 514. *R. v. Levy*, 2 Stark. R. 458. Abbott, C. J.

(*q*) Nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.

(*r*) And a case might occur where time was of the essence of the offence, and yet it might not be essential to prove the precise time; as, for instance, if a statute made the doing of an act in certain months of

the year an offence, it would suffice to prove that the act was done between such a day and such another day in those months, though the particular day could not be proved. See *R. v. Chandler*, 1 Ld. Raym. 581, and *R. v. Simpson*, 10 Mod. R. 248.

(*s*) *R. v. Forsyth*, Russ. & Ry. C. C. R. 274.

(*t*) 1 Stark. Ev. 454. *R. v. Gillham*, 6 T. R. 265. 1 Phil. Ev. 213 *n.*, 7th ed.

#### AMERICAN NOTE.

<sup>1</sup> See *S. v. Baker*, 34 Maine, 52. *M'Dade v. S.*, 20 Ala. 51. *Wingard v. S.*, 13 Ga. 396.

the jury that the copy was the same as the defendant had given to the witness. (u)

A question frequently arises in cases where the prisoner pleads that he has been previously acquitted, whether the acquittal has been of the same offence for which he is indicted. Thus where the prisoners, having been acquitted of a rape on Mary Lee, pleaded that acquittal to another indictment for a rape on Mary Lee at the same time and place as was alleged in the other indictment, and issue was taken on the identity of the rapes charged in the two indictments, the prisoners' counsel only put in the record of the previous acquittal, and the commitment of the magistrates for a rape on Mary Lee; and Bolland, B., told the jury that it did not appear to him that there was any evidence of the identity of the rapes charged in the two indictments. (v)

(u) *Fryer v. Gathercole*, 4 Exch. R. 262. Alderson, B., said, 'If I give a shilling to a person to take up stairs and to put away, and he hands me one back as the same, it would be a question for the jury to say whether it is the same, and there is nothing unreasonable if they find that it is.' Alderson, B., also said, 'Suppose I pass my hand across my eyes for an instant, so as to lose sight of the coin for a moment, cannot I prove the identity?' Pollock, C. B., treated the question as one of degree. The evidence would be weaker or stronger in proportion as the numbers of the work were more or less, and the probability of the copy being the same would be greater or less according as there had been more or less lendings of it.

(v) *R. v. Parry*, 7 C. & P. 836, S. C. *R. v. Lea*, 2 M. C. C. R. 9. The jury, however, found a verdict for the prisoners, and it was held that this verdict could not be disturbed. Bolland, B., was strongly of opinion that the commitment was not admissible. In *R. v. Martin*, 8 A. & E. 481, Lord Denman, C. J., asked, 'Have you any authority for saying that identity is shewn *prima facie* by collation of the indictments? A defendant may have stolen the goods of the same party twenty times;' and on *R. v. Parry* being cited, Lord Denman, C. J., said, 'The point as to the sufficiency of the proof was not decided by the fourteen judges.' But there is no doubt that there was no evidence whatever of identity in that case.

## CHAPTER THE THIRD.

### OF WRITTEN EVIDENCE.

*Of the Proof and Effect of—1. Public Documents, p. 439.—2. Private Documents, p. 469.*

**1. Public documents. Statutes.**<sup>1</sup>—Acts of Parliament are either public or private. The printed statute book is evidence of a public statute. (a) A private Act of Parliament was usually proved formerly by a copy examined with the Parliament roll. (b) But now, by the 8 & 9 Vict. c. 113, s. 3, 'All copies of private, and local and personal Acts of Parliament not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all Courts, judges, justices and others, without any proof being given that such copies were so printed.'

By the 13 & 14 Vict. c. 21, s. 7, 'Every Act made after (A. D. 1850) shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act.' A private Act may contain clauses of a public nature, and then the Act, as far as those are concerned, is to be regarded as a public Act. Thus a clause relating to a public highway, occurring in a private Enclosure Act, has been holden provable in the same way as a public Act. (c) In some Acts of Parliament not relating to the kingdom at large, a special clause is often inserted declaring them to be public Acts, and that they shall be taken notice of as such, without being specially pleaded; in which case they are to be proved in the same manner as public Acts; it is not necessary to prove them by an examined copy, or to shew that the printed copy was printed by the Queen's printer. (d) The clause referred to was intended for the facility of proof; it will not give the Act the effect of a public Act for other purposes, as with

(a) Gilb. Ev. 10. 2 Phil. Ev. 127, 1 Stark. Ev. 274.

(b) Bull. N. P. 225.

(c) R. v. Utterby, 2 Phil. Ev. 128, per Holroyd, J. And see Hob. 227.

(d) 2 Phil. Ev. 128, citing *Beaumont v. Mountain*, 10 Bing. R. 404. 4 M. & Sc. 177. *Woodward v. Cotton*, 1 C. M. & R. 44. 4 Tyrw. 689.

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#### AMERICAN NOTE.

<sup>1</sup> See *Levy v. S.*, 6 Ind. 281. *Pickard v. Bailey*, 6 Foster, 152. *Dixon v. Thatcher*, 14 Ark. 141.

regard to the recital of facts contained in it. (e) A clause was often formerly inserted in private Acts, providing that they should be printed by the King's printer, and that a copy so printed should be admitted as evidence of the Act. In such cases, a copy, purporting to be printed by the King's printer, will be admissible in evidence: it is not necessary to prove that the Act was purchased from the King's printer. (f) By the 41 Geo. 3, c. 90, s. 9, copies of the statutes of Great Britain and Ireland prior to the Union, printed by the printer duly authorised, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.

The preamble of a public Act of Parliament, reciting that certain outrages had been committed in particular parts of the kingdom, was adjudged by the Court of King's Bench to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (g)

**Journals of the Houses of Parliament.** — The journals of the House of Lords or of the House of Commons are evidence in criminal cases as well as in civil, and may be proved by examined copies; but the printed journals were not formerly evidence. (h) But now, by the 8 & 9 Vict. c. 113, s. 3, noticed *ante*, p. 439, 'copies of the journals of either House of Parliament, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof, without any proof being given that such copies were so printed.'

**Gazette.** — The public Acts of Government, and Acts by the King in his political capacity, are commonly announced in the Gazette, published by the authority of the Crown; and of such Acts announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence. (i) The Gazette itself must be produced and a cutting from it is inadmissible. (j) A proclamation for reprisals, published in the Gazette, is evidence of an existing war. (k) Proclamations for a public peace, or for the performance of a quarantine, and any acts done by or to the King in his regal character, may be proved in this manner, or by printed copies under the 8 & 9 Vict. c. 113, s. 3; (l) and upon the same principle, articles of war, purporting to be printed by the King's printer, are allowed to be evidence of such articles. (m) A Gazette, in which it was stated

(e) 2 Phil. Ev. 129, citing *Brett v. Beales*, M. & M. 421.

(f) 2 Phil. Ev. 129, *Lincoln Sum. Ass.* 1832, by J. A. Park, J. R. v. Wallace, 10 Cox, C. C. 500. Where the copy of an Act is incorrect, the Court will be governed by the Parliament roll. *R. v. Jeffries*, 1 Str. 446. *Spring v. Eve*, 2 Mod. 240.

(g) *R. v. Sutton*, 4 M. & S. 532.

(h) *Lord Melville's case*, 24 How. St. Tr. 683. *Chubb v. Solomons*, 3 C. & K. 75. *Jones v. Randall*, Cowp. 17. But a resolution of either House is not evidence of the truth of the facts there affirmed; and therefore, in the case of *Titus Oates*, who was charged with having committed perjury on the trial of persons suspected

of the Popish Plot, a resolution in the journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. 4 St. Tr. 39, 1 Phil. Ev. 406, 7th ed.; but see 2 Phil. Ev. 106.

(i) 2 Phil. Ev. 107, 108. 1 Stark. Ev. 279.

(j) *R. v. Lowe*, 15 Cox, C. C. 286.

(k) 2 Phil. Ev. 107, 108. 1 Stark. Ev. 279.

(l) See this clause, *ante*, p. 439. See also the Documentary Evidence Act, 1868, *post*, p. 441.

(m) 2 Phil. Ev. 108, 109. See the 27 & 28 Vict. c. 119, as to the articles of war for the Navy.

that certain addresses had been presented to the King, has been adjudged to be proper evidence to prove an averment of that fact in an information for a libel; (*n*) for they are addresses, said Lord Kenyon, C. J., of different bodies of the King's subjects, received by the King in his public capacity, and they thus become Acts of state. And in *R. v. Forsyth*, (*o*) the twelve judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from.

**Proclamations, &c.** — In *R. v. Sutton* (*p*) the Court of King's Bench determined that the King's proclamation (which recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrage of that particular description had been committed in those parts of the country.

By the Documentary Evidence Act, 1868, (31 & 32 Vict. c. 37):—

Sec. 2. '*Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto (*q*) may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned, that is to say:

(*n*) *R. v. Holt*, 5 T. R. 436. S. C. 2 Cox, C. C. 500. See 31 & 32 Vict. c. 37, Leach, 593. *infra*.

(*o*) *R. & R.* 274. *R. v. Wallace*, 10 (p) 4 M. & S. 532.

(*q*) SCHEDULE.

COLUMN 1. Name of Department or Officer.	COLUMN 2. Names of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.

By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 83, the Documentary Evidence Act, 1868, shall apply to the Education Department in like manner as if the Education Department were mentioned in the first column of the schedule to that Act, and any member of the Education Department, or any secretary or assistant secretary of the Education Department, were mentioned in the second column of that schedule.

By the Post-office Act, 1870 (33 & 34 Vict. c. 79), s. 21, the Documentary Evi-

dence Act, 1868, shall have effect as if the Postmaster-General were mentioned in the first column, and any secretary or assistant secretary of the post-office were mentioned in the second column of the schedule to that Act; and any approval of the Treasury under this Act shall be deemed an order within that Act.

See 33 & 34 Vict. c. 14 (the Naturalisation Act, 1870), s. 12; 34 & 35 Vict. c. 70 (the Local Government Board Act, 1871), s. 5; 36 & 37 Vict. c. 71 (the Salmon Fishery Act, 1873), s. 64.

(1) By the production of a copy of the Gazette, purporting to contain such proclamation, order, or regulation. (2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the Legislature of such British colony or possession. (3) By the production, in the case of any proclamation, order, or regulation, issued by Her Majesty or by the Privy Council, of a copy or extract, purporting to be certified to be true by the Clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and in the case of any proclamation, order, or regulation issued by or under the authority of any of said department or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such departments or officer.

‘Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy or of extract from any proclamation, order, or regulation.’ (r)

Sec. 6. ‘The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute, or existing at common law.’

**Public documents.** — By the Documentary Evidence Act, 1882 (45 Vict. c. 9), sec. 2, ‘Where any enactment, whether passed before or after the passing of this Act, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document, shall be conclusive evidence or be evidence, or have any other effect when purporting to be printed by the Government printer, or the Queen’s printer, or a printer authorised by Her Majesty or otherwise under Her Majesty’s authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence of Her Majesty’s stationery office.’

Sec. 3 provides that any person forging any such document or tendering a forged copy in evidence, shall be guilty of felony, (s) and by sec. 4, the 31 & 32 Vict. c. 37, as amended, is extended to Ireland.

By the Post-Office Act, 1884 (47 & 48 Vict. c. 76), sec. 19 (see Vol. II. p. 399), a certificate signed by the Postmaster-General or any secretary, or assistant secretary to the post-office, that a letter-box was established by the authority or permission of the Postmaster-General is evidence of the facts stated therein.

By the 8 & 9 Vict. c. 113, s. 1, ‘Whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall

(r) Sec. 4 imposes penalties for forging or using forged documents as evidence. See vol. ii. p. 693.

(s) See vol. ii. p. 693.



be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.'

Sec. 2. 'All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers shall henceforth take judicial notice of the signature of any of the equity or common law judges of the Superior Courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.'

A certificate of a conviction made at the quarter sessions for a borough within the Municipal Corporations Act, purporting to be signed by a person described thereon as deputy clerk of the peace of the said borough, and having the custody of the records of the said quarter sessions, is admissible in evidence, under the 8 & 9 Vict. c. 113, s. 1, as purporting to be made by an officer having the custody of the records of the court where the conviction was made, within the 5 Geo. 4, c. 84, s. 24, although the Municipal Corporations Act (5 & 6 Will. 4, c. 76) gave no power to appoint a deputy clerk of the peace for a borough within that Act. Per Bramwell, B., 'A person *de facto* filling an office, carrying with it the custody of the records of the court, may lawfully give such a certificate, although he may not hold such office *de jure*.' (t)

By 23 & 24 Vict. c. 127, s. 22, any list of attorneys, solicitors, and conveyancers, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of attorneys, solicitors, and conveyancers who have obtained stamped certificates for the current year, on or before the first day of January in the same year, shall, until the contrary be made to appear, be evidence in all courts, and before all justices of the peace and others, that the persons named therein as attorneys, solicitors, or conveyancers, holding such certificates as aforesaid for the current year, are attorneys, solicitors, or conveyancers holding such certificates, and the absence of the name of any person from such list shall, until the contrary be made to appear, be evidence as aforesaid, that such person is not qualified to practise as an attorney, solicitor, or conveyancer under a certificate for the current year; but in the case of any person being an attorney or solicitor, whose name does not appear in such list, an extract from the roll of attorneys and solicitors kept by the registrar, certified under the hand of the Secretary of the Incorporated Law Society (while such society performs the duties of registrar), or of the registrar for the time being, shall be evidence as aforesaid of the facts appearing in such extract, and in

(t) R. v. Parsons, 35 L. J. M. C. 167.

the case of any person, being a conveyancer, whose name does not appear in such list, the fact of his being so shall be proved in the way in which it is now by law required to be proved. (u)

**Building and other societies. Proof of certificates and rules.** — By The Building Societies Act, 1874 (37 & 38 Vict. c. 42), sec. 20, 'Any certificate of incorporation or of registration, or other document relating to a society under this Act, purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by the Court and by all courts of law and equity, and elsewhere, without proof of the signature, and a printed copy of the rules of a society, certified by the secretary, or other officer of the society, to be a true copy of its registered rules, shall, in the absence of any evidence to the contrary, be received as evidence of the rules.'

By the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), sec. 75, 'Every copy of rules or other instrument or document, copy or extract of an instrument or document bearing the seal or stamp of the central office shall be received in evidence without further proof, and every document purporting to be signed by the chief or any assistant registrar or any inspector or public auditor under this Act shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature.'

By the 40 & 41 Vict. c. 26, s. 6, it is enacted 'that any certificate of the incorporation of any company given by the registrar or by any assistant registrar for the time being shall be received in evidence as if it were the original certificate, and any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of joint-stock companies in England, Scotland, or Ireland, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant registrar, shall in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document.'

By the 44 & 45 Vict. c. 60, s. 15, 'Every copy of an entry in or extract from the register of newspaper proprietors purporting to be certified by the registrar (v) or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors so far as the same appear in such copy or extract, without proof of the signature thereto, or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shewn.'

**Proof of minutes of meeting of town council.** — By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), sec. 22, 'A minute of proceedings at a meeting of the council or of a committee signed at the same or the next ensuing meeting by the mayor or by a member

(u) R. v. Wenham, 10 Cox, C. C. 222.

(v) By sec. 1, 'The word "registrar" shall mean in England the registrar for the

time being of joint-stock companies or such person as the Board of Trade may for the time being authorise in that behalf.'

of the council or of the committee describing himself as or appearing to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof until the contrary is proved. Every meeting of the council or of a committee in respect of the proceedings whereof a minute has been so made shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly qualified, and where the proceedings are proceedings of a committee, the committee shall be deemed to have been duly constituted and to have had power to deal with the matters referred to in the minutes.'

By sec. 24, 'The production of a written copy of a bye-law made by the council under this Act or under any former or present or future, general or local Act of Parliament, if authenticated by the corporate seal, shall, until the contrary is proved, be sufficient evidence of the due making and existence of the bye-law, and, if it is so stated in the copy, of the bye-law having been approved and confirmed by the authority whose approval and confirmation is required to the making or before the enforcing of the bye-law.' (w)

**Bankruptcy proceedings.** — By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sec. 132, (1) 'A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

'(2) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.'

Sec. 133. (1) 'A minute of proceedings at a meeting of creditors under this Act signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

'(2) Until the contrary is proved every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed, or proceedings had thereat, to have been duly passed or had.'

Sec. 134. 'Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.'

Sec. 136. 'In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.'

(w) As to the punishment for tendering forgeries in evidence under these sections, see 45 & 46 Vict. c. 50, s. 235, vol. ii. p. 693.

Sec. 140. (1) 'All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof, unless the contrary is shewn.

'(2) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified.'

**Documents under certain acts.** — By the Patents Act, 1883 (46 & 47 Vict. c. 57), sec. 89, 'Printed or written copies or extracts purporting to be certified by the comptroller and sealed with the seal of the Patent Office of or from patents, specifications, disclaimers, and other documents in the Patent Office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in Her Majesty's dominions and in all proceedings, without further proof or production of the originals.'

By sec. 98, 'If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor.'

By sec. 96, 'A certificate purporting to be under the hand of the comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made and of the contents thereof, and of the matter or thing having been done or left undone.'

By the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), sec. 11, 'Any copy or extract of any deed registered under the Act purporting to be an office copy or extract shall in all courts be admitted as *primâ facie* evidence thereof, and of the fact and date of registration as shewn thereon.'

By the Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), sec. 5, 'The production of the copy of any bye-law made under the Act, purporting to be signed by a secretary or assistant secretary of the Board of Trade, shall be conclusive evidence of the bye-law and the making and confirmation thereof.'

By the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), sec. 8, 'Any document drawn up in pursuance of Art. 7 or Art. 10 of the Schedule to this Act (which relate to claims to compensation and to infractions of the convention), shall be admissible in any proceeding, civil or criminal, as *primâ facie* evidence of the facts or matters therein stated. If the evidence contained in any such document was taken on oath in the presence of the person charged in such evidence, and such person had an opportunity of cross-examining the person giving such evidence, and of making his reply to such evidence, the officer drawing up such document may certify the said facts or any of them.

‘Any document or certificate in this section mentioned purporting to be signed by an officer authorised to act under the Schedule to this Act for carrying into effect the convention, shall be admissible in evidence without proof of such signature, and if purporting to be signed by any other person shall, if certified by any such officer to have been so signed, be deemed, until the contrary is proved, to have been signed by such other person.

‘If any person forges the signature of any such officer to any such document as above mentioned, or makes use of any such document, knowing the signature thereto to be forged, such person shall be guilty of a misdemeanor and liable on summary conviction to imprisonment for a term not exceeding three months, with or without hard labour, and on conviction on indictment to imprisonment with or without hard labour for a term not exceeding two years.’

By the Lunacy Act, 1890 (53 Vict. c. 5), sec. 144, ‘Every office copy of the whole of an order or report confirmed by fiat purporting to be signed by a Master and sealed or stamped with the seal of the Masters’ Office, and every office copy of a certificate in lunacy, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted as evidence of the order, report, or certificate of which it purports to be a copy, without further proof thereof.’ (x)

By the Commissioners for Oaths Act, 1889 (52 Vict. c. 10), sec. 6, ‘Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorised by this section to administer an oath (y) in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person or of the official character of that person.’

By the Inland Revenue Act, 1890 (53 & 54 Vict. c. 21), sec. 24, ‘All regulations, minutes, and notices purporting to be signed by a secretary or assistant secretary of the Commissioners and by their order, shall, until the contrary is proved, be deemed to have been so signed, and to have been made and issued by the Commissioners, and may be proved by the production of a copy thereof purporting to have been so signed.

‘In any proceeding the letter or instructions under which a collector or officer or person employed in relation to inland revenue has acted, shall be sufficient evidence of any order issued by the Treasury or by the Commissioners, and mentioned or referred to therein.

‘Evidence of a person being reputed to be or having acted as a commissioner or collector or officer or person employed in relation to inland revenue shall, unless the contrary is proved, be sufficient evidence of his appointment or authority to act as such.’

(x) As to forging the seal or signature, see vol. ii. p. 692.

(y) Every British ambassador, envoy, minister, chargé d’affaires, and secretary of embassy or legation, exercising his func-

tions in any foreign country, and every British consul, general consul, vice-consul, acting consul, pro-consul, and consular agent exercising his functions in any foreign place.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), secs. 694 and 695, provision is made for the proof of documents made admissible (z) in evidence by that Act, and of examined copies of such documents.

**Records.** — Records are proved either by producing the record itself, or by an exemplification, or by a copy. (a) As a general rule, when *nul tiel* record is pleaded, the record, if a record of the same court, is produced and inspected by the Court; if a record of an inferior court, it is proved by the tenor of the record certified under a writ of *certiorari* issued by the superior court; if a record of a concurrent superior court, it is proved by the tenor certified under a writ of *certiorari*, issued out of chancery, and transmitted thence by writ of *mittimus*. (b) The issue of *nul tiel* record seldom occurs in criminal cases, except in the instance of a plea of *autrefois acquit*, &c. (c)

Wherever it was necessary to prove the finding or the trial of an indictment, the record must formerly have been regularly drawn up, and either produced, or an examined copy of it produced and proved. Where, therefore, an indictment for a conspiracy alleged that at a Court of Quarter Sessions an indictment was preferred against A. B., and found by the grand jury, the Court of King's Bench held that the indictment endorsed a true bill, but without any caption to it, and the minutes made by the clerk of the peace containing the style of the sessions, and the minutes of the business done at it, were not sufficient evidence of the finding of the bill, and that the record itself or an examined copy was the only legitimate evidence to prove it. (d) And so it has been held that a plea of *autrefois convict* cannot be supported by the indictment with the finding of the grand jury upon it. (e) So where the prisoner was in fact confined in Abingdon gaol, and the governor of that gaol proved that he was present in Court when the prisoner was tried for housebreaking, and heard sentence passed upon him, and he produced the calendar of the sentences passed at those assizes signed by the clerk of assize, and stated that there was not any other authority for carrying into execution the sentences of the Court at the assizes, even in cases of murder; Maule, J., held that this was not evidence of the prisoner

(z) By sec. 719, all documents purporting to be made, issued, or written by or under the direction of the Board of Trade, shall under certain conditions be admissible in evidence under the Act.

(a) 1 Stark. Ev. 388.

(b) Tidd. 801, 804. Rosc. Ev. 73. Before the 14 & 15 Vict. c. 99, s. 13, where a record of a court of quarter sessions was pleaded in a court of oyer and terminer, or the converse, it ought, in strictness, to have been proved as above stated: but the practice, it is said, was to apply simply to the clerk of the peace, or clerk of assize, who would make it out for you without writ, or would attend with the record itself at the trial. Arch. Cr. Pl. 124. See now the above Act, noticed, *post*, p. 450, which it seems applies in the cases mentioned in it, where there is an issue of *nul tiel* record.

(c) In which case it seems the 14 & 15

Vict. c. 99, s. 13, *post*, p. 450, applies. Upon this plea, the proof of the issue lies on the defendant, and he will have to prove the record of acquittal; and also, it has been said, the averments of identity in his plea. 1 Arch. Cr. Pl. 89. But this seems doubtful, for if the replication is *nul tiel* record, it should seem to admit the identity. See vol. i. p. 38 *et seq.*

(d) R. v. Smith, 8 B. & C. 341.

(e) R. v. Bowman, 6 C. & P. 101. See the cases collected in note (h), vol. i. p. 49, and Porter v. Cooper, 6 C. & P. 354, and R. v. Thring, 5 C. & P. 507, where Gurney, B., held that the minute-book of the Court of Quarter Sessions was not admissible in evidence on an indictment for perjury to prove the trial on which the perjury was alleged to have been committed; and R. v. Bellamy, R. & M. N. P. R. 171.

being in lawful custody, as the sentence of the Court at the assizes could only be proved by the record. (*f*) Where on an indictment for the non-repair of certain highways, upon the trial of which the question was, whether a parish was bound to repair all the highways in it as a parish, or the several townships the highways situate in each of them, in order to prove the conviction of the parish upon a similar indictment in 1806, a witness proved that he went to the house of the clerk of assize for the Oxford circuit, in London, and there saw him and his son, and asked for the record, and received a written paper, which he produced, which he and the son of the clerk of assize compared with a document then produced as the record, and which the witness stated he thought was on paper, but he was not sure whether it was on paper or parchment, but it was much torn, and the son of the clerk of assize stated that he could not recollect the particular transaction; but the practice was, when a record was required, to make it out from the minutes and the indictment on an original parchment roll, which was signed by the clerk of assize, and a copy was then made on paper and compared with the roll, and stamped with the Oxford circuit stamp, which copy was given to the party applying for it, and that, as far as his own experience went, the roll was drawn up from the indictment and minutes, without any paper draft in the first instance being made, and that he never knew of a paper-copy having been kept; and that the paper produced was signed by his father and stamped with the circuit stamp; Coleridge, J., held that the paper was admissible as an examined copy of the record. (*g*)

The minutes of a court of oyer and terminer may be received, where the matter to be proved by the minutes has occurred before the same Court sitting under the same commission; as upon the trial of Horne Tooke, where the minutes of the Court were received as proof of the trial of Hardy. (*h*) So the indictment with the officer's note upon it of a verdict of not guilty is sufficient evidence during the same assizes, upon a plea of *autrefois acquit*, that the prisoner was acquitted upon such indictment. (*i*) And so the caption of the general gaol delivery of the Central Criminal Court, the indictment with the note of the prisoner's plea, the verdict and the sentence entered thereon, together with the minutes of the trial entered by the officer of the Court in the minute book, are sufficient evidence at a subsequent session of the Central Criminal Court. (*j*)

But although it was once held, on the trial of an indictment for perjury alleged to have been committed on the trial of an appeal against an order of removal, that the sessions book produced by the clerk of the peace was not sufficient to prove the trial of the appeal; (*k*)

(*f*) R. v. Bourdon, 2 C. & K. 366.  
(*g*) R. v. The Inhabitants of Pembridge, C. & M. 157.

(*h*) 2 Phil. Ev. 135, citing 25 St. Tr. 446.

(*i*) R. v. Parry, 7 C. & P. 836, Bolland, B.

(*j*) R. v. Newman, 2 Den. C. C. 390; 21 L. J. M. C. 75.

(*k*) R. v. Ward, 6 C. & P. 366, J. A. Park, J. The clerk of the peace stated that he should have drawn up a record on parchment, if he had been applied to so to do, and the case does not state what the form of the entry in the book was. See the observations of the Court on this case in R. v. Yeovely, 8 A. & E. 806, *infra*.

yet where on an appeal against an order of removal the book containing the proceedings at the sessions was proved to be the original sessions book, regularly made up and recorded after each sessions by the clerk of the peace, from minutes taken by him in Court, and the minutes of each sessions were headed by an entry containing the style and date of the sessions, and the names of the justices in the usual form of a caption, and no other record was kept of the proceedings of the sessions than the said sessions book, and it had always been received in evidence in the Court of Quarter Sessions, for the purpose of proving them; the Court of Queen's Bench held, that such book was properly received in order to prove the quashing of an order of removal on the trial of a former appeal between the same parishes. (*l*)

When *nul tiel* record is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, the record may be proved either by an exemplification or a copy. Exemplifications are either under the great seal or under the seal of the Court in which the record is produced, and are admissible without proof of the genuineness of the seal. (*m*) A record may also be proved by an examined copy, except upon the issue of *nul tiel* record. (*n*) The copy must be proved by some witness who has examined it line for line with the original, or who has examined the copy while another read the original. (*o*) It ought to appear that the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records. (*p*) So an office copy in the same Court in the same cause, is equivalent to a record; but in another court, or in another cause in the same Court, the copy must be proved. (*q*) In order to prove a verdict, a copy of the whole record, including the judgment, is necessary, for otherwise it would not appear but that the judgment had been arrested, or a new trial granted. (*r*) Where an indictment for perjury alleged that Burraston was convicted upon an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record when produced that Burraston had been convicted, but the judgment against him reversed upon error after the finding of the present indictment, it was held that the record produced supported the allegation in the indictment. (*s*)

By the 14 & 15 Vict. c. 99, s. 13, 'Whenever in any proceeding whatever (*t*) it may be necessary to prove the trial and conviction

(*l*) *R. v. Yeovely*, 8 A. & E. 806, and see per Patteson, J., in *R. v. Nottingham Old Water Works Company*, 6 A. & E. 355.

(*m*) *Tooker v. Duke of Beaufort*, Sayer, 297.

(*n*) Upon this issue the record in certain cases can be proved in the mode pointed out by the 14 & 15 Vict. c. 99, s. 13, *infra*.

(*o*) *Reid v. Margison*, 1 Campb. 469. It is not necessary for the persons examining to exchange papers, and read them alternately. *Gyles v. Hill*, *ibid.* n. As to the examination of the whole of the rules of a

benefit society enrolled at the office of the clerk of the peace, see *R. v. Boynes*, 1 C. & K. 65, vol. i. p. 390.

(*p*) *Adamthwaite v. Synge*, 1 Stark. 183. 4 Campb. 372. S. C.

(*q*) *Rosc. Ev.* 75. *Burnand v. Nerot*, 1 C. & P. 578.

(*r*) *Bull. N. P.* 234. But the *nisi prius* record, with the postea endorsed, is sufficient evidence that the cause came on to be tried. *Pitton v. Walter*, 1 Str. 162.

(*s*) *R. v. Meek*, 9 C. & P. 513, *Williams, J.*, vol. i. p. 318.

(*t*) *Richardson v. Wilks*, 42 L. J. Ex. 15. L. R. 8 Ex. 69.



or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the Court or other officer having the custody of the records of the Court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.' And see the 14 & 15 Vict. c. 100, s. 22. (u)

By 34 & 35 Vict. c. 112, s. 18, 'a previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the Court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same. A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom, and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section. The mode of proving a previous conviction authorised by this section shall be in addition to and not in exclusion of any other authorised mode of proving such conviction.'

The several statutes which afford facilities for proving a previous conviction by means of a certificate of the clerk of assize, or clerk of the peace, are made for the more easy proof of such convictions, and do not prevent the proof of the previous conviction by an examined copy of the record. (v)

(u) vol. i. p. 332.

(v) *R. v. Henry Saunders*, Gloucester Spr. Ass. 1829, MSS. C. S. G. The prisoner was indicted under the 15 Geo. 2, c. 28, s. 2, for uttering base coin after a previous conviction, and Parke, J., held that an examined copy of the record of the previous conviction was sufficient evidence

thereof; for the statute, by giving an easier means of proof under sec. 9, did not exclude the proof by means of an examined copy. See also *R. v. Carter*, 1 Den. C. C. 65. *Northam v. Latouche*, 4 C. & P. 140. *Edwards v. Buchanan*, 3 B. & Ad. 788, *R. v. Manwaring*, D. & B. 132.

By the 1 & 2 Vict. c. 94, ss. 12, 13, every copy of a record in the custody of the Master of the Rolls certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the record office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there in evidence.

Records properly produced in evidence are conclusive against those who are parties to them:—thus a record of conviction of a parish for not repairing a road, is for ever afterwards evidence of its liability to repair; (*w*) but it is not conclusive as against other parties, except as to the fact that the persons charged have been convicted; (*x*) therefore an accessory may controvert the guilt of his principal, notwithstanding the record of his conviction, (*y*) and it seems that the record of the conviction of the principal is not admissible against the accessory in any case. (*z*)

**Proof of a writ and proceedings.**—A writ may in general be proved by the production of it. But when it is treated as matter of record in the pleading it must be proved by a copy of the record after the writ has been returned. (*a*) The existence of an action in the High Court may be proved by the production by the proper officer of the copy writ filed under order 5, rule 13. (*b*) An answer in chancery is proved by the production of the bill and answer, or of examined copies of them; (*c*) but on proof by the proper officer that the bill has been searched for in the office, and not found, the answer may be read without the bill. (*d*) Depositions in a suit in chancery are not in general admissible without proof of the bill and answer. (*e*) The 12 & 13 Vict. c. 109, s. 11, enacts that a seal shall be provided for the High Court of Chancery, to be called the Chancery Common Law Seal, and that ‘all courts, tribunals, judges, justices, officers, and other persons shall take notice of the said seal, and receive impressions thereof in evidence, in like manner as impressions of the Great Seal are received in evidence, and shall also take notice of and receive in evidence, without further proof, all and every of such writs, proceedings, instruments, documents, and writings which shall

(*w*) *R. v. St. Pancras, Peake, N. P. C.* 219; see 2 Saund. 160, vol. i. p. 817.

(*x*) See *R. v. Shaw, R. & R.* 526, where upon an indictment for delivering instruments to a prisoner to facilitate his escape from gaol, it was held that the record of his conviction being produced by the proper officer, no evidence was admissible to dispute what it stated.

(*y*) *R. v. Smith, 1 Leach,* 288.

(*z*) *R. v. Turner, R. & M. C. C. R.* 347, vol. i. p. 190. In *Keable v. Paine, 8 A. & E.* 555, Patteson, J., said, ‘On an indictment for receiving goods feloniously taken, the felony must be proved, and neither a judgment against the felon, nor his admission, would be evidence against the receiver.’

(*a*) *Bull. Ni. Pri.* 234.

(*b*) *R. v. Scott, 2 Q. B. D.* 415.

(*c*) 2 Phil. Ev. 139. The recital in the jurat of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at that place. *R. v. Spencer, R. & M. N. P. C.* 97.

(*d*) *Gilb. Ev.* 49. See as to the proof of the identity of the parties, *post*, p. 470. An answer offered in evidence merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree, or the party’s handwriting. *Lady Dartmouth v. Roberts, 16 East,* 334. See also *Ewer v. Ambrose, 4 B. & C.* 25.

(*e*) *Bull. N. P.* 240. *Gilb. Ev.* 62. *Rosc. Ev.* 79. 2 Phil. Ev. 149.

purport or appear to be sealed or stamped with the said Chancery Common Law Seal, in like manner as if the same had been sealed with the Great Seal.' And by sec. 13, every office copy issued from the Petty Bag Office shall be sealed with the said Common Law Seal, and every document sealed with such seal, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be received in evidence before either House of Parliament, and any committee thereof, and also by all courts, tribunals, judges, justices, officers, and other persons, in like manner and to the same extent as the original record or other document would be received if tendered in evidence for the purpose of proving the contents of such record or other document. (f) The proceedings in the ecclesiastical courts are proved in the same way at common law as those in equity; and their sentences are received in the temporal courts as conclusive evidence of the fact adjudged, upon questions within their jurisdiction; but in a suit of jactitation of marriage a sentence against the marriage is not conclusive, as it decides not directly, but only collaterally, on the validity of the marriage. (g) By 20 & 21 Vict. c. 85, a court of record, called the Court for Divorce and Matrimonial Causes, was established. By sec. 13 of this Act the Lord Chancellor shall direct a seal to be made for the said Court, and may direct the same to be broken, altered, and renewed at his discretion; and all decrees and orders, or copies of decrees or orders, of the said Court, sealed with the said seal, shall be received in evidence.

When it is necessary to shew a title to personalty under a will, or that a particular person is executor, the will cannot be read in evidence, but the probate must be produced. (h) The seal of the ecclesiastical court on the probate proves itself. (i) Generally speaking, a probate unrevoked is conclusive evidence of the validity of the will; but on an indictment for forging a will, probate of that will unrevoked is not conclusive evidence of its validity, so as to be a bar to the prosecution. (j) To prove a probate revoked, an entry of the revocation in the book of the ecclesiastical court, called the 'assignment book,' in which all causes were officially entered, is good evidence. (k) Administration granted before the Probate Act, 20 & 21 Vict. c. 77, is proved by the production of the letters of administration, or a certificate or exemplification thereof, granted by the ecclesiastical court, (l) or by the original book of Acts, directing the grant of letters, or an examined copy of it. (m) By the 20 & 21 Vict. c. 77, the Court of Probate was established. By sec. 22 of that Act the judge shall cause to be made seals for the Court of Probate, that is to say, one seal to be used in its principal registry, and sepa-

(f) See secs. 17, 18, and 19, as to the seal for the enrolment office, the certificates of enrolment and sealed copies of enrolments being evidence.

(g) *Duchess of Kingston's case*, 11 St. Tr. 263.

(h) *R. v. Barnes*, 1 Stark. N. P. C. 243.

(i) *Kempton v. Cross*, Cas. Temp. Hardw. 108. 20 & 21 Vict. c. 77, s. 22, *infra*.

(j) *R. v. Buttery*, R. & R. 342.

(k) *R. v. Ramsbottom*, 1 Leach, 25, in note to *Rhodes's case*.

(l) *Kempton v. Cross*, Cas. Temp. Hardw. 108.

(m) *Elden v. Keddel*, 8 East, 187. *Davis v. Williams*, 13 East, 232.

rate seals to be used in the several district registries, and may cause the same respectively from time to time to be broken, altered, and renewed at his discretion; and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

Judgments in a court-baron, or other inferior court, may be proved by the production of the book containing the proceedings of the court from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an examined copy of such proceedings or minutes will be evidence. (*n*) But this rule does not extend to proceedings of the Court of Quarter Sessions on the Crown side, which is a court of record. (*o*) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), sec. 28, it is enacted, that the registrar of every court shall cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the registrar of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof. (*p*)

**Foreign judgment.**<sup>1</sup>—The judgment of a foreign court was formerly generally proved by proving the authenticity of the seal affixed to the judgment. In the case of *Henry v. Adey*, where the plaintiff, who sued here on a judgment obtained in the Island of Grenada, was nonsuited, because he could not prove the seal affixed to be the seal of the island, the Court said, they could not take official notice that the seal affixed was the seal of the island, which was necessary to be shewn in order to prove the judgment, which it purported to authenticate; and that proving the judge's handwriting could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. (*q*) If a colonial court

(*n*) *R. v. Hains*, per Holt, Comb. 337. 12 Vin. Ab. Ev. A. b. 26, p. 99. Rosc. Ev. 80. As to its being necessary in proving the judgment of such a court to give evidence of the proceedings previous to the judgment, see Com. Dig. Ev. C. 1.

(*o*) *R. v. Smith*, 8 B. & C. 341.

(*p*) See *Dews v. Ryley*, 20 L. J. C. P. 264. *R. v. Rowland*, 1 F. & F. 72.

(*q*) 3 East, 221. 2 Phill. Ev. 143. See also *Buchanan v. Buckner*, 1 Campb. 63. *Flindt v. Atkins*, 3 Campb. 215, in a note. The 6 Geo. 4, c. 133, s. 7, enacting that the

common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, did not make such certificate evidence without proof that the seal affixed is the genuine seal of the society. *Chadwick v. Bunning*, R. & M. N. P. C. 306. But the 14 & 15 Vict. c. 99, s. 8, makes the proof of the seal or of the authenticity of the certificate unnecessary. Where a sheriff's officer produced the warrant under which he had acted, which concluded, 'given under the

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<sup>1</sup> See as to foreign judgments, *Slaughter v. Cunningham*, 24 Ala. 260. As to judgments of different States. *S. v. Lawson*, 14 Ark. 114.

possess a seal, it ought to be used for the purpose of authenticating its judgments. (r) If it is clearly proved that the court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shown to possess some other requisite to entitle it to credit; as by proving the signature of the judge upon the judgment. (s) An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the court, is evidence of the judgment in the courts of this country: (t) but a document, purporting to be a copy of a judgment made by the officer of the court, is not admissible. (u)

But now, by the 14 & 15 Vict. c. 99, s. 7, 'all proclamations, treaties, and other Acts of State of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other Act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.'

By 28 & 29 Vict. c. 63, entitled 'An Act to remove doubts as to the validity of Colonial Laws,' s. 6, 'the certificate of the clerk or other

seal of my office,' and there was a small piece of paper wafered to it, and stamped with a wafer stamp; and the officer proved that he did not know this to be the seal of the sheriff or of his officer, but that he had received the warrant from the person who had acted as under-sheriff, and it was precisely similar to all the other warrants under which he had acted; Parke, B., held that this was sufficient proof of the seal. *Bunbury v. Matthews*, 1 C. & K. 380.

(r) *Cavan v. Stewart*, 1 Stark. N. P. C. 525.

(s) *Alves v. Bunbery*, 4 Campb. 28. 2 Phill. Ev. 143.

(t) *Black v. Lord Braybrook*, 2 Stark. N. P. C. 11, 12.

(u) *Appleton v. Lord Braybrook*, 2 Stark. N. P. C. 6, 7. 6 M. & S. 34. 2 Phill. Ev. 143.

proper officer of a legislative body in any colony, (v) to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure, by the said governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent.'

**Proof of foreign laws.**—The law of a foreign state must be proved. (w) Where, to prove the law of France as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French courts,—it was ruled by Abbott, C. J., to be sufficient proof of the law. (x) The law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill. (y) And the proper course to prove the law of a foreign country is to call a witness expert in it, and to ask him, on his responsibility, what that law is, and not to read any fragments of a code. (z) So a person of experience in the profession of the law of another country may state what in his opinion, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. Thus a gentleman at the Scotch bar has been allowed to state his opinion, whether a marriage, as proved by the witnesses, would be valid according to the Scotch law. (a) And where, on an indictment for bigamy, it was proved that the prisoner had been married to a soldier of the name

(v) By sec. 1 the term "colony" shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty, under or by virtue of any Act of Parliament for the government of India. The terms "Legislature" and "Colonial Legislature" shall severally signify the authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony.

The term "Representative Legislature" shall signify any colonial legislature which shall comprise a legislative body, of which one half are elected by inhabitants of the colony.

The term "Colonial Law" shall include laws made for any colony either by such legislature as aforesaid, or by Her Majesty in Council:

An Act of Parliament, or any provision

thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament.

The term "Governor" shall mean the officer lawfully administering the government of any colony.

The term "Letters Patent" shall mean letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

(w) *Clegg v. Levy*, 3 Campb. 166. *Rosc. Ev.* 82. *Baron de Bode's case*, *post*, p. 457.

(x) *Lacon v. Higgins*, 3 Stark. 178.

(y) *Per Gibbs, C. J.*, *Miller v. Kendrick*, 4 Campb. 155.

(z) *Cocks v. Purday*, 2 C. & K. 269, *Erle, J.* The *Sussex Peerage case*, 11 Cl. & F. 85, *infra*.

(a) *R. v. Wakefield*, *Murray's ed.*, p. 238.

of Dent, and afterwards to one Wall, and the defence was that Dent had been legally married in Scotland, previous to his marriage with the prisoner, and a witness proved that Dent being with his regiment in Scotland, the witness, Dent, a female, and several others, went to a house, to which they were directed after inquiring for the house of the clergyman of the place, where a gentleman performed a ceremony somewhat similar to the marriage service of the Church of England, between Dent and the female, and that they afterwards lived together as man and wife; Wightman, J., held that a gentleman who had lived in Scotland until he was twenty, and who had frequently been there since, and who was possessed of very considerable literary attainments, and stated that he was well acquainted with the law of marriage in Scotland, although he was not a lawyer, was competent to prove that the marriage in question was a valid marriage according to that law. (b) But this case was expressly overruled in the *Sussex Peerage case*, (c) where it was held that the person who proves a foreign law must be *peritus virtute officii vel professionis*; and that though the witness may refresh his memory, or correct or confirm his opinion, by foreign law books, yet the law itself must be taken from his evidence. (d) Where, therefore, evidence having been given to shew the state of the law of inheritance in Alsace at a particular time, a witness was called, who stated himself to be a French advocate practising at Strasbourg, in the department of Bas Rhin, and that the feudal law had been put an end to in Alsace by the torrent of the French revolution *de facto* in 1789, and by the treaty of Luneville *de jure*; and upon being asked whether there was not a decree to that effect, he added that there was such a decree of the 4th of August, 1789, of the National Assembly, and that he had learned this in the course of his legal studies, it being part of the history of the law which he learned while studying the law: it was objected that this evidence could not be received, unless the decree itself were proved and put in; but the majority of the Court of Queen's Bench held that it might; for the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. If an English court were to attempt to expound the written law of a foreign country, it would be liable to the most serious errors. The question is not what the language of written law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication. (e)

Where a witness was a German jurisconsult, and had studied the German law at the University of Leipsic in Saxony, but had not transacted business at Cologne, and had no knowledge of the laws

(b) *R. v. Dent*, Monmouth Spring Ass. 1843, MSS. C. S. G. 1 C. & K. 97.

(c) 11 Cl. & F. 85. See *R. v. Savage*, 13 Cox, C. C. 178.

(d) In this case it was held that a Roman Catholic Bishop, holding the office of coadjutor to a vicar apostolic in this

country, was, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore competent to prove that law.

(e) Baron de Bode's case, 8 Q. B. 208, 246. Patteson, J., *dissentiente*.

of Cologne but from books; Alderson, B., held that he could not give evidence of the law of Cologne, as he had not had any practice at Cologne. (*f*) But where a native of Belgium stated that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel-keeper in London, and that he was well acquainted with the Belgian law upon the subject of bills and notes; it was held that he was competent to prove that by the law of Belgium it is not necessary, even though a bill or note is made payable at a particular place, that it should be presented there for payment; for inasmuch as he had been carrying on a business which made it his interest to take cognisance of the foreign law, he fell within the description of an expert. (*g*)

A judgment obtained in one of the superior courts in Ireland, since the Union, is not a record in England. (*h*) But now by the 14 & 15 Vict. c. 99, s. 9, 'every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.'

Sec. 10. 'Every document which by any law now in force or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.' (*i*)

By the 22 & 23 Vict. c. 63, in any judicial proceeding instituted in any court, civil, criminal, or ecclesiastical, within Her Majesty's dominions, if the court deem it necessary for the proper disposal of such proceeding to ascertain the law applicable to the facts of the

(*f*) *Bristow v. De Secqueville*, 3 C. & K. 64; and this ruling was held correct by the full Court. 5 Exch. R. 275. *In the goods of Bonelli*, 45 L. J. Prob. 42.

(*g*) *Vander Donckt v. Thellusson*, 8 C. B. 812. The competency of a witness to prove foreign law is a question for the Court, and it seems, as a general rule, that in order to render a person competent he should have some peculiar means, from his

profession or business, of becoming acquainted with the law with respect to which he is called on to speak. *Vander Donckt v. Thellusson*, 8 C. B. 812, Cresswell, J. See *R. v. Povey*, 6 Cox, C. C. 83.

(*h*) *Harris v. Saunders*, 4 B. & C. 411.

(*i*) By sec. 11, documents admissible without proof of seal, &c., in England, Wales, or Ireland, are equally admissible in the colonies.



case as administered in any other part of Her Majesty's dominions, the court in which the proceeding is pending may direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, &c., and the court shall settle the question of law arising out of the same, and remit the case to the superior court whose opinion is desired in such other part of Her Majesty's dominions. The Act then prescribes the mode of obtaining the opinion of the court, and of remitting it to the court by which the opinion was required, which court is thereupon to apply such opinion to such facts in the same manner as if the same had been pronounced by such court itself upon a case reserved, or upon a special verdict; or the court may, if the opinion has been obtained before the trial, order it to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, of the foreign law therein stated.

The 24 & 25 Vict. c. 11, contains similar provisions for the purpose of enabling any superior court in Her Majesty's dominions to obtain the opinion of any court of any foreign state with which Her Majesty may have made a convention for that purpose, as to the law of such state.

**Convictions.** — Convictions before justices of the peace are either produced in court, and the handwriting of the magistrates to them proved, (*j*) or they may be proved by examined copies, which the clerk of the peace of the proper county will make out, upon an application for that purpose, (*k*) or they may be proved in certain cases by copies or certificates under the provisions of sundry statutes. (*l*) But a conviction cannot be proved by the notes in the minute book of the justices before whom it took place, or by oral evidence. (*m*)

**Public books, registers, &c.** — In many instances, public books are admitted in evidence to prove the facts recorded in them. The muster-book in the navy office has been admitted in evidence to prove the death of a sailor; (*n*) the book from the Master's office in the Court of King's Bench, to prove a person one of the attorneys of that Court; (*o*) and the log-book of a man-of-war, which convoyed a fleet, to prove the time of the convoy's sailing. (*p*) Bank-books are good evidence to prove the transfer of stock; (*q*) and on a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence to support an allegation in the indictment that he was duly elected treasurer. (*r*) The day-book of a public prison, containing a narrative of the transactions of the prison, has been received

(*j*) *Massey v. Johnson*, 12 East, 67. *Gray v. Cookson*, 16 East, 13. *Mason v. Barker*, Gloucester Spr. Ass. 1843, *Erskine*, J. MSS. C. S. G.

(*k*) Arch. Cr. P. 213.

(*l*) See 24 & 25 Vict. c. 96, ss. 112, 116, 24 & 25 Vict. c. 97, s. 70, and the 24 & 25 Vict. c. 96, s. 110, and 24 & 25 Vict. c. 97, s. 68, provide that, when any conviction is quashed on appeal, a memorandum thereof is to be made on the conviction, and a copy thereof is to be added to any

copy or certificate of the conviction, and is to be sufficient evidence that the conviction has been quashed.

(*m*) *Giles v. Siney*, 11 Law T. 310.

(*n*) Bull. N. P. 249. *Rhodes's case*, 1 Leach, 24.

(*o*) *R. v. Cropley*, 2 Esp. N. P. C. 524.

(*p*) *D'Israeli v. Jowett*, 1 Esp. N. P. C. 427.

(*q*) *Breton v. Cope*, Peake, N. P. C. 30. *Marsh v. Colnet*, 2 Esp. N. P. C. 665.

(*r*) *R. v. Martin*, 2 Campb. 100.

upon the same principle, as proof of the time of a prisoner's commitment or discharge; (*s*) but it would not be admissible to prove the cause of his commitment. (*t*) So on an indictment for forging a seaman's will, an entry in a book called the assignation-book, in which all causes are officially entered, was admitted to prove the probate revoked. (*u*) The registers of christenings, marriages, and burials, preserved in churches, are good evidence; (*v*) and in order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rung the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved, even where the register is not produced; (*w*) or persons may be called who were present at the wedding dinner, &c. (*x*) Registers are, however, in the nature of records, and need not be produced or proved by subscribing witnesses. (*y*) They, therefore, may be proved either by an examined copy or by a copy certified under the 14 & 15 Vict. c. 99, s. 14. (*z*)

The 6 & 7 Will. 4, c. 86, 'An Act for registering Births, Deaths, and Marriages in England,' by sec. 38 enacts that 'all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry.' (*a*)

By 37 & 38 Vict. c. 88 (Births and Deaths Registration Act, 1874) s. 38, 'an entry, or certified copy of an entry, of a birth or death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry, to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea; and when more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports,

(*s*) *R. v. Aickles*, 1 Leach, 391.

(*t*) *Salte v. Thomas*, 3 B. & P. 188. 2 Phill. Ev. 164.

(*u*) *Ramsbottom's case*, 1 Leach, 25, in note. It would have been no bar to the conviction had the probate been unsealed. *R. v. Buttery*, R. & R. 342.

(*v*) Bull. N. P. 247.

(*w*) *Sayer v. Glossop*, 2 Exch. R. 409.

(*x*) *Birt v. Barlow*, Dougl. 171. As to

mere similarity of names being evidence of identity, see *Hubbard v. Lees*, L. R. 1 Ex. 255, *post*, p. 470.

(*y*) Per Lord Mansfield, *Birt v. Barlow*, 1 Dougl. R. 171.

(*z*) *Post*, p. 462.

(*a*) The Marriage Act, 6 & 7 Will. 4, c. 85, s. 44, incorporates that Act with the 6 & 7 Will. 4, c. 86.

- (a) If it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar, as well as by the registrar, or
- (b) If more than twelve months have so intervened, to have been made with the authority of the Registrar General, and in accordance with the prescribed rules.'

'When more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry made after the commencement of this Act of the death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules.'

By sec. 49, where reference is made in this Act to a registrar or superintendent registrar in connection with any birth or death or other event, or any register, such reference shall (unless the contrary be expressed) be deemed to be made to the registrar who is the registrar for the sub-district in which such birth or death or other event took place, or who keeps the register in which the birth or death or other event is or is required to be registered, or who keeps the register referred to, and to the superintendent registrar who superintends such register as aforesaid.

By sec. 51, this Act, save as is herein otherwise expressly provided, shall extend only to England and Wales.

The 3 & 4 Vict. c. 92, which relates to registers or records of births or baptisms, deaths or burials, and marriages lawfully solemnised, kept in England and Wales, other than the parochial registers and the copies thereof deposited with the diocesan registrars, enacts that all registers and records deposited in the general register office by virtue of that Act (except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in 1821), shall be deemed to be in legal custody, and shall be receivable in evidence, subject to the provisions of that Act. By sec. 17, 'in all criminal cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the Court the original register or record.' (b)

By 27 & 28 Vict. c. 97, after reciting that provision is made by law in England for the registration of burials performed according to the rites of the Established Church, and of all burials in grounds provided under the Burials Act; and that it is expedient that all burials in England be registered: it is enacted as follows:

'1. All burials in any burial ground in England which are not now

(b) In civil cases, sec. 9 makes extracts stamped with the seal of the office admissible in evidence. The 21 & 22 Vict. c. 25, extends the provisions of the 3 & 4

Vict. c. 92, to other registers of a similar description. See 37 & 38 Vict. c. 88, fifth schedule.

by law required to be registered shall be registered in register books to be provided for each such burial ground by the company, body, or persons to whom the same belongs, and to be kept for that purpose according to the laws in force by which registers are required to be kept by rectors, vicars, or curates of parishes or ecclesiastical districts in England.

'2. Such register books shall be so kept for every such burial ground by some officer or person to be appointed to that duty by the company, body, or persons to whom such burial ground belongs.

'3. Copies of the register books kept under this Act for every such burial ground shall be from time to time made, verified, and signed by such officer or person as aforesaid, and sent by him to the registrar of the diocese wherein the burial ground to which the same relates is situate, to be kept with the copies of the register books of the parishes, within such diocese.

'5. The register books kept under this Act, or copies thereof, or extracts therefrom, shall be received in all courts as evidence of the burials entered therein.'

Whenever an original is of a public nature, and admissible in evidence, an examined copy is also admissible. (*c*) Thus examined copies of the entries in the council-book, or of a licence preserved in the secretary of state's office, (*d*) of entries in the bank-books, (*e*) of entries in the books of the East Indian Company, (*f*) or in the books of the commissioners of the land tax, (*g*) or of excise, (*h*), are allowed to be read in evidence. So an examined copy of a parish register is evidence, (*i*) but not an examined copy of the register of a marriage in the Swedish ambassador's chapel in Paris. (*j*) It seems, however, that the books of the King's Bench or Fleet prisons, which, as it has been just mentioned, are evidence of the time of a prisoner's discharge, are not such public documents that a copy of them may be given in evidence. (*k*)

And now by the 14 & 15 Vict. c. 99, s. 14, 'whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.' (*l*)

(*c*) *Lynch v. Clerke*, 3 Salk. 154.

(*d*) *Eyre v. Palgrave*, 2 Campb. 606.

(*e*) *Marsh v. Coinett*, 2 Esp. 665.

(*f*) *Dougl.* 593, n.

(*g*) *R. v. King*, 2 T. R. 234.

(*h*) *Fuller v. Fotch*, Carth. 346.

(*i*) *Bull. N. P.* 247.

(*j*) *Leader v. Barry*, 1 Esp. 353.

(*k*) *Salte v. Thomas*, 3 B. & P. 190. 2 Ph. Ev. 164.

(*l*) The provisions in this section are only cumulative, and do not restrict the

A copy of an entry in the register book of births in a registrar's district within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody, was held to be admissible evidence of the entry in the register book upon the mere production of such copy. (m)

**Inspection of records.**—The judicial records of the King's Courts are safely kept for public convenience, that any subject may have access to them for his necessary use and benefit; which was the ancient law of England, and is so declared by an Act of Parliament in the 46th year of Edward III. (n) But in the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the Court. (o) This rule, it is said, proceeds from an anxiety to protect prosecutors from

proof to the mode pointed out by this section. *R. v. Manwaring*, D. & B. 132, where Williams, J., said, 'I must protest against it being supposed that I agree in the notion that when a document of a public nature cannot be produced the parties are tied down to any particular mode of secondary proof.' See *Dorrett v. Meux*, 15 C. B. 142, and see *R. v. Manwaring*, D. & B. 132, as to a certificate of a superintendent registrar of the registration of a chapel.

(m) *R. v. Weaver*, 43 L. J. M. C. 13, 12 Cox, C. C. 527.

(n) 2 Phill. Ev. 174.

(o) This practice originated with an order made in the 16 Car. 2, by Hyde, Chief Justice of the King's Bench; Bridgman, Chief Justice of the Common Pleas; Twisden, J., Tyril, J., and Kelyng, J., 'to be observed by the justices of the peace and others at the sessions in the Old Bailey,' as follows: 'That no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the King upon great occasions.' Kel. 3. The jurisdiction of these judges to make this order appears extremely questionable, and has been frequently doubted. See *Browne v. Cumming*, 10 B. & C. 70, and the authorities there referred to. In *R. v. Brangan*, 1 Leach, 27, the prisoner, having been acquitted, applied for a copy of the indictment; but Willes, C. J., admitting that the prosecution bore the strongest marks of being malicious, refused the application, because it was not necessary that he should grant it, declaring that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it, &c.; and that after a demand of it had been made the proper officer might be punished for refusing to make it out. In *Browne v. Cum-*

ming, the Court expressed no opinion as to the authority of the judges to make the order, but refused to restrain the plaintiff from using a copy of an indictment alleged to have been improperly obtained, on the ground that, taking all the facts together, they did not think there had been a mistake or misrepresentation of such a nature as to call upon the Court to interfere. The order in question, if not expressly overruled, is much shaken by *R. v. The Justices of Middlesex*, 5 B. & Ad. 1113. In that case Bowman had been tried and convicted of larceny at the Clerkenwell sessions, after those sessions had lapsed for want of an adjournment, and being indicted for the same offence afterwards, at the Old Bailey, he proposed to plead *autrefois convict*, and the Court adjourned the case to give time for an application for a copy of the record; *R. v. Bowman*, 6 C. & P. 101; and an application was afterwards made to the clerk of the peace for a copy of the record, which was refused. And the Court of Queen's Bench granted a mandamus to make up the record of the proceedings against Bowman, on the ground that 'the prisoner had a right to have the record of the proceedings which passed at the sessions correctly made up, and to make any use of it he could.' The report in *R. v. The Justices of Middlesex* erroneously states the application for the mandamus to have been after the prisoner had pleaded his former conviction. See *R. v. Bowman*, 6 C. & P. 101, and 337. This case seems to overrule *R. v. Vandercomb*, 2 Leach, 708, and *R. v. Parry*, 7 C. & P. 836, where the Court refused to grant the prisoners copies of their indictments, in order to enable them to plead *autrefois acquit*, and seems to establish the position that the prisoner is entitled, *as of right*, to a copy of the indictment for such a purpose; and if for such a purpose, it is difficult to see why he should not have the same right for the purpose of instituting a civil suit to seek reparation for the injury which he has sustained by the malicious conduct of the prosecutor. C. S. G.

being harassed by unfounded actions for malicious prosecutions, which actions cannot be maintained without proving the fact of the prosecution by the record or an examined copy of it; and it has also been said that it is not usual to grant a copy of the record of acquittal where there is any the least probable cause for the prosecution. (*p*) But the copy is admissible without proof of the order of the court allowing a copy of the record; for though it be the duty of the officer charged with the custody of the records of the court not to produce a record, or give a copy of it but upon competent authority, yet if the officer, in neglect of his duty, shall have given a copy, or produces the original, the evidence in itself is unobjectionable, and must be received. (*q*) The rule is confined to cases of felony; in prosecutions for misdemeanors the defendant is entitled to a copy of the record, as a matter of right, without a previous application to the court. (*r*) Formerly a defendant on a criminal charge was not entitled to an inspection of the grounds upon which the prosecution was instituted; (*s*) and therefore, neither in cases of treason nor of felony had he any right to a copy of the depositions of the witnesses who were to appear against him. (*t*)

But now the 6 & 7 Will. 4, c. 114, 'An Act for enabling persons indicted of felony to make their defence by counsel or attorney,' by sec. 3 enacts 'that all persons who after the passing of this Act shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have, on demand (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same), copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail, or committed to prison on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words; provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged.'

Sec. 4. 'All persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or cop-

(*p*) Tidd. 647. *Groenvelt v. Barrett*, 1 *Ld. Raym.* 253. It seems that a person acquitted is entitled to a copy of the record as a matter of right. See note (*o*) *supra*.

(*q*) *Legatt v. Tollervey*, 14 *East*, 302.

(*r*) *Morrison v. Kelly*, 1 *Black. Rep.* 385. *Evans v. Phillips*, *MS. Selw. N. P.* 952. 2 *Phill. Ev.* 176.

(*s*) 2 *Phill. Ev.* 178.

(*t*) 2 *Phill. Ev.* 178. In some species of treason the prisoner is entitled to a copy

of the indictment, *ibid.* *R. v. Holland*, 4 *T. R.* 691. In that case an information had been filed against an officer of the East India Company, on charges of delinquency founded upon a report of a board of inquiry in India; and the Court of King's Bench were of opinion that he had no right to have an inspection of that report, and that the Court had no discretionary power to grant it.

ies thereof) which have been taken against them, and returned into the Court before which such trial shall be had.' (u)

(u) Sec. 1, reciting that 'it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them,' enacts that 'all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attorneys practise as counsel.' Sec. 2, providing that in all cases of summary conviction persons accused shall be admitted to make their full answer, &c., is repealed by the 11 & 12 Vict. c. 42, but re-enacted by sec. 12. As to the practice which has prevailed since this statute passed, it has been held that a prisoner's counsel cannot be permitted to tell the jury any facts which he has heard from the prisoner, but which he is not in a condition to prove. *R. v. Butcher*, 2 M. & Rob. 228, Coleridge, J. If the prisoner does not employ counsel, he is at liberty to make a statement for himself, and tell his own story, which is to have such weight with the jury as, all circumstances considered, it is entitled to; but if he employs counsel he must submit to the rules which have been established with respect to the conducting cases by counsel. *R. v. Beard*, 8 C. & P. 142, Coleridge, J. And the same learned judge held that after the prisoner's counsel had addressed the jury for him, the prisoner himself was not at liberty also to address them. *R. v. Boucher*, 8 C. & P. 141. But where on an indictment for maliciously wounding the prosecutor when no other person was present, the prisoner had made a statement before the magistrate, which was not put in by the counsel for the prosecution; Alderson, B., permitted the prisoner to make a statement before his counsel addressed the jury, and then his counsel addressed the jury and commented on the prisoner's statement as according with the evidence, and only supplying what was otherwise deficient in it. The learned Baron said, 'I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement, as one of the circumstances of the case. On trials for high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat the defence intended by his counsel; but if so, the ends of justice will be furthered; besides, it is often the genuine defence of the party, and not a mere imaginary case invented by the ingenuity of counsel.' *R. v. Malings*, 8 C. & P. 242. And at the same assizes Gurney, B., after conferring with Alderson, B., allowed a similar course to be adopted, but said that he thought it ought not to be

drawn into a precedent; and the prisoner read a written statement. *R. v. Walking*, 8 C. & P. 243. The report does not state what the particular facts were in this case. Alderson, B., allowed the same course in *R. v. Dyer*, 1 Cox, C. C. 113, and *R. v. Williams*, 1 Cox, C. C. 363; and in *R. v. Manzano*, 2 F. & F. 64, Martin, B., after consulting Channell, B., allowed the same course, as there was a precedent for it in 8 C. & P., although he was entirely opposed to the practice. But where on an indictment for child-murder the two previous cases in 8 C. & P. were cited, and permission asked for the prisoner to make a statement, Patteson, J., said, 'The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence, his counsel can do that much better than he can.' The prisoner did not make any statement. *R. v. Rider*, 8 C. & P. 539. And where on an indictment for a misdemeanor in uttering base coin, a prisoner wished to make a statement of facts to the jury before his counsel addressed them, and it was said that Lord Denman, C. J., had allowed it to be done; Bosanquet, J., refused to permit it, and observed that he was not informed of the circumstances of the cases decided on this Act, which he thought could only be meant to put prisoners in the same situation in felonies as they were in before in misdemeanors, and in those cases certainly a defendant could not be allowed the privilege of two statements, one by himself, and one by his counsel. *R. v. Burrows*, 2 M. & Rob. 124. And so where *R. v. Dyer*, *supra*, and *R. v. Malins*, *supra*, were cited, Byles, J., refused to allow the prisoner to state his defence before his counsel addressed the jury, but gave the prisoner the option of either speaking himself or having his counsel speak for him. No facts are stated in this case, which was a Mint prosecution. *R. v. Taylor*, 1 F. & F. 535. Counsel for the prosecution, except in very simple cases, open the case before calling witnesses. See *R. v. Gascoine*, 7 C. & P. 772. *S. P. R. v. Morgan*, 6 Cox, C. C. 116, per Talfourd, J. In *R. v. Shimmer*, 15 Cox, C. C. 122, Cave, J., laid down as the rule of practice which he said had been approved by the judges, that a prisoner defended by counsel was not entitled to have his explanation of the case made by his counsel, but might himself at the conclusion of his counsel's address make a statement to the jury, subject to this, that

The 11 & 12 Vict. c. 42, s. 34, repealed this Act so far 'as relates to the right of parties charged with offences to have copies of the depositions or examinations against them,' and by sec. 27 enacts that 'at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the Court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words.'

The 22 & 23 Vict. c. 33, which authorised coroners to admit to bail any person against whom a verdict of manslaughter had been found, by sec. 3 enacted that every person against whom a coroner's jury had found a verdict of manslaughter should be entitled to have copies of the depositions on which such verdict was found. (v)

At a meeting of the judges after the passing of the 6 & 7 Will. 4, c. 114, for the purpose of choosing the Spring Circuits of 1837 (Littledale, J., Bosanquet, J., and Coleridge, J., being absent from indisposition), a discussion took place as to some points which were thought likely to occur at the assizes, in consequence of the recent Act for allowing prisoners indicted for felony to make full defence by counsel; and the course of practice which the judges present thought it would be most advisable to adopt will be found in 7 C. & P. 676. Rules 1, 2, & 3, as to cross-examining a witness on his deposition made before a magistrate, are obsolete, by reason of 28 & 29 Vict. c. 18, noticed *post*.

what he then says may be treated as additional facts, and may be replied on by the counsel for the prosecution. This, however, seems to conflict with 28 Vict. c. 18, s. 2, which only allows a reply where no evidence is adduced for the prisoner. If, however, the prisoner's counsel calls witnesses, the prisoner cannot make a statement. Per Lord Coleridge, C. J. *R. v. Millhouse*, 15 Cox, C. C. 622.

(v) This Act is now repealed by 50 & 51 Vict. c. 71. Two questions arise respecting the 6 & 7 Will. 4, c. 114, s. 3: 1st, Did that section apply to depositions before a coroner? In *R. v. White*, 5 Cox, C. C. 562, Platt, B., held that it did; and this ruling seems to be correct; for the paramount intent of the Act to give the prisoner copies of the depositions in all cases is so clear, and the absurdity of holding that a person committed for murder is not entitled to copies of the depositions before the coroner, though he is to those before magistrates, is so great, that the reasonable construction of the clause is that the prisoner is entitled to copies in both cases alike; though Archbold (*Jerv. Acts*, 84, 2nd ed.) has expressed a strong doubt on the point. The next question is, how far is the section repealed by the 11 & 12 Vict. c. 42, s. 34? That clause was not referred to in *R. v. White*,

which was decided after that Act passed. That case, therefore, can hardly be treated as an authority that the clause is not repealed as to depositions before a coroner; but, although the terms of the repeal are wide, it should seem that they may reasonably be limited so as only to repeal the clause as to depositions before magistrates; for a verdict of murder or manslaughter may be found by a coroner's jury against a person who is not present at the inquest, and it can hardly be correctly said that any person is charged with an offence before a coroner, or that the depositions are taken against any one on the holding of an inquest. If this reasoning be correct, the 22 & 23 Vict. c. 33, s. 3, was unnecessary, and the difficulty arising from that clause being confined to manslaughter is immaterial.

The 6 & 7 Will. 4, c. 114, gave the prisoner no right to copies of the depositions after the commencement of the assizes or sessions, unless the Court were of opinion that the copies might be made without inconvenience; and this part of the section does not appear to be affected by the repeal, as the repeal only extends to 'the right of parties charged with offences to have copies.'



Rule 4. If the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do. (*w*)

Rule 5. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner. (*x*)

A prisoner is not entitled under the Act to a copy of his own examination, taken before the committing magistrate, which has been returned with the depositions, but only to a copy of the depositions of the witnesses against him. (*y*) This decision, observes Mr. Phillips, (*z*) is founded on the express language of the Act, which speaks of depositions of witnesses, and says nothing of the examinations of prisoners. Yet it may in some cases be as necessary for the full defence of the prisoner that he should be furnished with a copy of his own statement taken in writing before the magistrate, as it is to have a copy of the depositions, especially where a part of the case for the prosecution consists of evidence intended to disprove or contradict the prisoner's statement. In such a case, if it were necessary for the ends of justice, the judge, by virtue of his judicial authority, might allow the prisoner to inspect his written examination. (*a*)

It was held that a prisoner was not entitled, under the 6 & 7 Will.

(*w*) See *ante*, p. 427. It is not usual to reply when witnesses to character alone are called.

(*x*) 7 C. & P. 676. In *R. v. Marsden*, M. & M. 439, an indictment for publishing a libel on the Duke of Wellington, the Attorney-General, instructed by the Solicitor for the Treasury, conducted the prosecution, and stated, in answer to an objection that he was not entitled to reply, that he appeared in his official capacity; Lord Tenterden, C. J., said, 'There is no doubt of the rule; wherever the King's counsel appears officially, he is entitled to reply.' But on the same day in *R. v. Bell*, *ibid.* 440, a criminal information for a libel on the Lord Chancellor, the Attorney-General stated that he appeared as the counsel and private friend of the Lord Chancellor, and, no evidence being offered in defence, he did not reply. In *R. v. Gardner*, 1 C. & K. 628, an indictment for stealing money out of a post letter, Whately, Q. C., claimed the reply, as he represented the Attorney-General; but it was urged that this was like a prosecution by any other of the public departments. Pollock, C. B., 'If this is a prosecution by the Attorney-General, those who represent him, though not usually counsel for the Crown, have the right to reply, as in the mint cases at the Old Bailey.' [On the Oxford circuit I never knew the right to reply claimed in a Mint case. I was myself counsel for the Mint at Hereford, Monmouth and Gloucester for many years, and never claimed, or had it suggested to me

that I should claim, the reply where no evidence was given for the prisoner.] And in *R. v. Taylor*, 1 F. & F. 535, which was a Mint prosecution on circuit, Byles, J., would not admit the right of reply. In *R. v. Beckwith*, 7 Cox, C. C. 505, an indictment for forging voting papers at an election of guardians of the poor, the prosecution had been directed by the Poor Law Board, and Bliss, Q. C., stated that he appeared for the Attorney-General and claimed the reply; citing *R. v. Gardner*; but Byles, J., said, 'I am of opinion that the right to reply where the prisoner calls no witnesses ought to be limited to the Attorney-General when prosecuting in person, and if I could do so, I would not allow it even in that case. I certainly cannot permit it under any other circumstances,' and refused to allow a reply. In *R. v. Christie*, 7 Cox, C. C. 506, an indictment for murder on the sea, Bliss, Q. C., at the close of the case for the prosecution, claimed the reply under any circumstances, as he appeared *ex officio* as Attorney-General of the County Palatine of Lancaster; Martin, B., 'I cannot admit your claim; the right is a very objectionable one; I shall limit it wherever possible, and I wish I could prevent even the Attorney-General of England from exercising it.' C. S. G.

(*y*) *R. v. Aylett*, 8 C. & P. 669, Littledale, J., and Parke, B.

(*z*) 2 Phill. Ev. 181.

(*a*) See per Coleridge, J., in *Ex parte Greenacre*, note (*f*), *infra*.

4, c. 114, s. 3, to copies of the depositions until he was finally committed or held to bail for the purpose of trial, and therefore he was not so entitled, on being committed for further examination (*b*), and it has also been held that a prisoner is not entitled, under the 11 & 12 Vict. c. 43, s. 27, to such copies, unless he has either been committed to prison to take his trial at a particular time, or has been admitted to bail to make his appearance at a certain time, for the purpose of being tried; and therefore a person committed till the next sessions for want of sureties to keep the peace, and then do what should be enjoined him by the Court, is not entitled to copies of the depositions taken against him. (*c*)

Where additional evidence has been obtained after the committal, but no depositions containing such evidence taken, the Court has no authority to order a copy of such evidence. (*d*)

Where the prisoner was committed for receiving iron, knowing it to have been stolen, and a person, who had been committed as having stolen the iron, was admitted as a witness for the Crown, Patteson, J., allowed the prisoner's counsel to inspect the depositions which had been returned against the person charged as the thief. (*e*)

Where a true bill was found against a prisoner for the murder of a person, on the investigation of whose death the coroner's jury returned a verdict of 'Wilful murder against some person or persons unknown,' and the depositions taken before the coroner were in the possession of the officer of the Court before whom the prisoner was to be tried; it was held that, although the coroner could not have been compelled to return the depositions under the 7 Geo. 4, c. 64, s. 4, yet the judges had power by their general authority as a court of justice, if they thought it essential to the interests of justice, to order a copy of them to be given to the prisoner. (*f*)

Where a prisoner was indicted for obtaining money by falsely pretending that a parcel contained a number of letters, and those letters had been seized under a search-warrant, and were in the possession of the prosecutrix, who had written and sent them to the prisoner, an order was made by the Central Criminal Court for an inspection of the letters, but not for copies. (*g*)

**Inspection of public books.** — Where civil rights are depending, a party has a right to inspect, and take copies of such books, &c., as are of a *public* nature, wherein he has an interest; (*h*) but a rule for inspecting a public writing is never granted where the party who has them in his custody would, by producing them for inspection,

(*b*) *R. v. Mayor of London*, 5 Q. B. 555.

(*c*) *Ex parte Humphrys*, 4 Sess. C. 179, Coleridge, J., who seemed also clearly of opinion that a prisoner would have no right to a copy of the depositions after he had been tried.

(*d*) *R. v. Connor*, 1 Cox, C. C. 233, Patteson, J.

(*e*) *R. v. Walford*, 8 C. & P. 767. The report does not state whether these depositions were taken in the presence or absence of the prisoner.

(*f*) *Ex parte Greenacre*, 8 C. & P. 32, Littledale, J., and Coleridge, J., and per

Coleridge, J., 'Supposing these depositions had been against some other person tried a year ago for an offence with which this particular prisoner had nothing to do, yet if we had them, have we not authority as a court of justice, if we think it essential to the interests of justice, to order a copy of them to be given to him? I think that we have.'

(*g*) *R. v. Colucci*, 3 F. & F. 103. *Quere* whether these letters were not the property of the prisoner; and *quere* the right to issue a search-warrant for them. C. S. G.

(*h*) Tidd, 647.

expose himself to a criminal prosecution; for in *criminal cases* a party is never compelled to furnish evidence against himself. (i)

2. *Proof of private documents.* — Before the 28 & 29 Vict. c. 18, the execution of all written instruments which were attested, whether under seal or not, must have been proved by the subscribing witness, if he could be produced, and was capable of being examined. (j) And this although he had become blind, as he might, from his recollection of the transaction, give most important evidence respecting it. (k) But where the attesting witness was dead, (l) or insane, (m) or absent in a foreign country, or not amenable to the process of the superior courts, (n) as where he was in Ireland, (o) or where he could not be found after diligent inquiry, (p) evidence of the witness's handwriting was admissible. (q) In these cases the proof of the subscribing witness's handwriting was evidence of the execution of the instrument by the party therein named, whose signature the instrument purported to bear; and for the purpose of proving the execution, that is, that the instrument was executed by the party so named, it was not necessary to prove the handwriting of the party. (r)

But now, by the 28 & 29 Vict. c. 18, s. 7, 'it shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness.'

Where an instrument is lost the execution by the parties may be proved. (s) It seems that in a case where attestation was requisite and where the attesting witness to a lost instrument is dead, it is unnecessary to prove his handwriting, unless it be necessary for the purpose of proving his identity. (t) Under particular circumstances an instrument signed by one prisoner and attested by another prisoner was held to be admissible against both upon proof of their signatures. (u) Where, before the above Act, the attesting witness to a promissory note was in Canada, and his handwriting was proved by his nephew, who did not know where either the defendant or the plaintiff lived, or anything about the defendant, or about his making his mark to the note, the Court of Exchequer held that this was in-

(i) Tidd, 649. As to the inspection of bankers' books under the Bankers' Books Evidence Act, 1879, see sec. 7 of the Act, *post*, p. 474.

(j) Doe v. Durnford, 2 M. & S. 62. Higgs v. Dixon, 2 Stark. N. P. C. 180. Abbot v. Plumb, 1 Dougl. 216. Whyman v. Garth, 8 Exch. R. 803.

(k) Cronk v. Frith, 9 C. & P. 197. Lord Abinger, C. B., 2 M. & Rob. 262.

(l) Anon. 12 Mod. 607. See R. v. St. Giles, 1 E. & B. 642.

(m) Currie v. Child, 3 Campb. 283.

(n) Prince v. Blackburn, 2 East, 250.

(o) Hodnett v. Forman, 1 Stark. N. P. C. 90.

(p) Cunliffe v. Sefton, 2 East, 183.

(q) 2 Phill. Ev. 210, *et seq.*

(r) 2 Phill. Ev. 214.

(s) Keeling v. Ball, Peake, Ev. App. xxxii.

(t) R. v. St. Giles, 1 E. & B. 642. 22 L. J. M. C. 54.

(u) R. v. Marsh, 1 Den. C. C. 505.

This was an indictment against Marsh and Lord for attempting to obtain money from an insurance company by a false claim in writing for a loss of a horse, which was signed by Marsh and attested by Lord; and Wightman, J., held that the document was admissible on proof of the handwriting of the prisoners without calling Lord as a witness. The point was reserved, but the case went off on an objection to the indictment, see vol. ii. p. 539, and this point was not noticed. It should be noticed that in this case the instrument was put in evidence as part of the fraud charged against both prisoners.

sufficient; for although proof of the attestation would be evidence of everything on the face of the instrument, viz., of everything he as attesting witness asserted, yet by his attestation he does not assert that *this defendant* signed the note, but that *some F. M.* did; that F. M. is left unidentified and unconnected with the person sued; but the issue to be proved is that this F. M. executed. (v) So where an attesting witness to a promissory note proved that the signature Hugh Jones was written on the note in his presence by a Hugh Jones who kept a public house at a particular place in Anglesea, but he had not seen him since the date of the note, and the name was a very common one in Anglesea; it was held, on the authority of the preceding case, that there was no sufficient evidence to go to the jury of the identity of the person who had signed the note with the defendant, against whom the action was brought upon the note. (w) But where a bill of exchange was directed to 'Charles Banner Crawford, East India House,' and a witness proved that the handwriting of the acceptance, 'C. B. Crawford,' was that of a clerk of that name in the East India House, who had left it five years ago, but he did not know whether he was the defendant in the action; it was held that there was sufficient evidence of the identity. (x) So where three bills of exchange were accepted in the name of Henry Thomas Ryde, and made payable at the Regent Street branch of the London and Westminster Bank, and the cashier of that bank proved that he knew the handwriting of Henry Thomas Ryde, and that the acceptances were in his writing, that he had kept an account at the Regent Street branch, but his only means of knowledge as to the handwriting consisted in his having as cashier paid cheques drawn in the name of Henry Thomas Ryde, whom he did not know and had never seen write; it was held that there was sufficient evidence of identity of the person who had accepted the bills with Henry Thomas Ryde, the defendant in an action brought upon those bills. (y) So where a witness proved that he saw a person of the name of William Seal Evans write a letter about five years ago, which letter was produced, and established a case against the defendant, William Seal Evans, for goods sold and delivered, if the identity of the writer and the defendant were shewn, but the witness had not seen the person since, and did not know whether he was the defendant; it was held that there was sufficient evidence of the identity. (z) Evidence that the defendant

(v) *Whitlock v. Musgrave*, 3 Tyrw. 541, C. & M. 521.

(w) *Jones v. Jones*, 9 M. & W. 75. Parke, B., 'The plaintiff might have called the defendant's attorney to say whether the person who employed him was the Hugh Jones who kept the public house.' Lord Abinger, C. B., said, 'The argument for the plaintiff might be correct, if the case had not introduced the existence of many Hugh Joneses in the neighbourhood where the note was made.'

(x) *Greenshields v. Crawford*, 9 M. & W. 314.

(y) *Roden v. Ryde*, 4 Q. B. 626.

(z) *Sewell v. Evans*, 4 Q. B. 626. This and the preceding case were decided at the same time. The grounds of the decision seem to have been, that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were one of very frequent occurrence, there might not be much ground for drawing the conclusion; but where a name is not so common, the inference would be different. The supposition that the right man has been sued is reasonable, because, if not, he might so easily prove that he

was present when the instrument was prepared, (a) or that he had made acknowledgments respecting it, (b) would be sufficient to connect him with the instrument. And if an instrument describes a party on the face of it by name, place of abode, and trade (as F. M. of R. in the county of Y., carpenter), the cases establish that proof of the handwriting of the subscribing witness would be sufficient to shew that it was signed by a person truly described as being of that name and place; but still the plaintiff must shew that the defendant corresponds with that description. (c) So where in an action against James Roberts, as a petitioning creditor, it appeared from the proceedings in the Bankruptcy that the petitioning creditor was James Roberts; it was held that this was sufficient *prima facie* evidence of identity. (d) So where a genuine licence was proved under the seal of the Apothecaries' Company, which granted a right to practise and dispense medicines as an apothecary to a person of the same Christian and surname as the plaintiff, who had acted as an apothecary, prescribing and dispensing medicines to his patients; it was held that there was ample evidence to go to the jury of the identity of the plaintiff with the person named in the licence. (e) So where in an action against a pilot for negligence in the management of a vessel, it was objected that no evidence had been given that the defendant was the pilot, whereon the plaintiff's counsel called out Mr. Henderson, intending to call the defendant's son as a witness to prove that fact, when a person answered him and said, 'I am the pilot;' he was not sworn, but was proved to have been acting as pilot at the time of the accident; it was held that there was some evidence of identity, as the name and calling resembled those of the defendant. (f)

**Handwriting how proved.**<sup>1</sup> — In *Doe d. Mudd v. Suckermore*, 5

was not the person, and on account of the danger a party would incur if he served process on a wrong party intentionally. In a criminal case it seems that in general the mere fact that a person of the same name as the prisoner signed a document or the like would not be considered sufficient evidence of identity. See *Logan v. Alder*, 3 Tyrw. 557, where Bolland, B., said, 'Suppose a person to be tried for forging the signature of W. R. Alder of H. House to a bond, and that the subscribing witness said, "I saw that bond signed at the inn I keep, but I never saw the party executing before or since," could that prisoner's case be left to the jury?' See *Roden v. Ryde*, *supra*, per Patteson, J., and Lord Denman, C. J. In *R. v. Ellen Murtagh*, 6 Cox, C. C. 447, the prisoner was indicted for making a false declaration, and it was proved that the declaration was made by a woman describing herself

as Ellen Murtagh, and that she affixed her mark to it, but the witnesses were unable to identify the prisoner as that woman, and a statement of the prisoner having been held inadmissible, she was acquitted, and it was not even suggested that there was any evidence to go to the jury. Pennefather, B., and Moore, J.

(a) *Nelson v. Whittall*, 1 B. & A. 19.

(b) *Whitlock v. Musgrave*, *supra*.

(c) *Whitlock v. Musgrave*, *supra*, per Bayley, J.

(d) *Hamber v. Roberts*, 7 C. B. 861.

(e) *Simpson v. Dismore*, 9 M. & W. 47, and see *Russell v. Smyth*, 9 M. & W. 810, where the same Christian and surname, profession, residence, and age of a person named in a suit as those of the defendant were held sufficient evidence of identity of the party named in the suit with the defendant.

(f) *Smith v. Henderson*, 9 M. & W. 978.

#### AMERICAN NOTE.

<sup>1</sup> See *Reid v. S.*, 20 Geo. 681. *Bowman v. Sanborn*, 5 Fost. 87. *C. v. Eastman*, 1 Cush. 189. *Adams v. Field*, 21 Verm.

256. *S. v. Shinborn*, 46 N. H. 497. *Jmperetz v. P.*, 21 Ill. 375.

Ad. & E. p. 780, Patteson, J., is reported to have said, 'All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker, according to the number of times and the periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; *Garrells v. Alexander* (g), *Powell v. Ford* (h), *Lewis v. Sapiro*; (i) or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party. *Lord Ferrers v. Shirley*, (j) Buller's Nisi Prius, 236, *Carey v. Pitt*, (k) *Thorpe v. Gisburne*, (l) *Harrington v. Fry*, (m) evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting, which have hitherto, as far as I have been able to discover, in our law been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both the witness acquires his knowledge by his own observations upon facts coming under his own eye, and as to which he does not rely on the information of others, and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document.'

If a witness states that he has only seen a party write once, but thinks the signature is his handwriting, it is evidence to go to the jury. (n) Where on an information for a libel, in order to shew that certain letters were in the handwriting of the defendant, a witness proved that he had never seen the defendant write, but he had seen a number of letters, which purported to have come from him on the subject of a cause in which he was engaged on one side, and the witness on the other side, and the witness had acted upon those letters in the course of the cause; Lord Tenterden, C. J., held

(g) 4 Esp. 37.

(h) 2 Stark. N. P. C. 164.

(i) M. &amp; M. 39.

(j) Fitzg. 195.

(k) Peake, Add. Ca. 130.

(l) 2 C. &amp; P. 21.

(m) R. &amp; M. 90.

(n) *Garrells v. Alexander*, 4 Esp. 37. 516.

*Lewis v. Sapiro*, M. & Malk. N. P. C. 39, by Abbott, C. J. *Stranger v. Searle*, 1 Esp. 14. *R. v. Crouch*, 4 Cox, C. C. 163. *R. v. Barber*, 1 C. & K. 434. A witness may prove the identity of a mark from having seen the person make it on several occasions. *George v. Surrey*, M. & M.

that the witness was competent to prove the defendant's handwriting. (o) But where an attorney for three defendants stated that he did not know the handwriting of one of the defendants, but before undertaking to defend the action, he had required a retainer signed by all three defendants, and had received a retainer purporting to be signed by all the defendants, upon which he had acted; it was held that the attorney was not competent to prove the handwriting of the one defendant; for one of the other two defendants might have signed the retainer for him with his assent. (p) Where a witness had observed a name signed to an affidavit, which had been used by the plaintiff's counsel in answer to an application to postpone the cause, and in the affidavit it was sworn that the party signing it was the plaintiff's wife; J. A. Park, J., held that the witness might speak to that person's name as the attesting witness to an agreement purporting to be signed by the plaintiff. (q)

Before the 28 & 29 Vict. c. 18, it was an established rule, that handwriting could not be proved by comparing the paper with any other papers acknowledged to be genuine. (r)

But now by the 28 & 29 Vict. c. 18, s. 8, comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses (s) respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. (t)

This section allows documents proved to be genuine but not relevant to the issue to be put in for the purpose of comparison. (u) The genuineness of such documents must be decided by the judge. (v) It seems that a person may write something in court for the express purpose of comparison under this section. A document, however, written under such circumstances, cannot altogether be relied on as representing the writer's ordinary handwriting. (w)

A witness giving evidence under this section need not be a professional expert, or a person whose skill in the comparison of handwriting has been gained in his profession or business. A solicitor who had paid some attention to the study of handwriting has been allowed to give evidence under the section. (x)

(o) *R. v. Slaney*, 5 C. & P. 213.

(p) *Drew v. Prior*, 5 M. & Gr. 264.

(q) *Smith v. Sainsbury*, 5 C. & P. 196.  
But see *Greaves v. Hunter*, 2 C. & P. 477.

(r) *R. v. Wilton*, 1 F. & F. 391, *Bramwell, B. R. v. Coleman*, 6 Cox, C. C. 163. *R. v. Shepherd*, 1 Cox, C. C. 237, *Erle, J. Griffith v. Williams*, 1 Cr. & J. 47. *Doe d. Perry v. Newton*, 5 A. & E. 514. 1 Nev. & P. 4. *Solita v. Yarrow*, 1 M. & Rob. 133. *Eaton v. Jervis*, 8 C. & P. 273. *Bromage v. Rice*, 7 C. & P. 548.

(s) See *R. v. Harvey*, 11 Cox, C. C. 546. *R. v. Williams*, 9 Cox, C. C. 448.

(t) This clause extends by sec. 1, 'to all courts of judicature, as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence.' See *Doe d. Mudd v. Suckermore*, 5 A. &

E. 702. 2 Nev. & P. 16. *R. v. Cator*, 4 Esp. 107. *Goodtitle v. Braham*, 4 T. R. 497. *Gurner v. Longlands*, 5 B. & A. 330. As to cross-examining a witness before this Act, as to other documents which were not in evidence in the case, see *Young v. Honner*, 2 M. & Rob. 536. 1 C. & K. 51. *Griffiths v. Ivory*, 11 Ad. & E. 322. *Hughes v. Rogers*, 8 M. & W. 123. *Parke, B.*

(u) *Birch v. Ridgway*, 1 F. & F. 270. *Cresswell v. Jackson*, 2 F. & F. 24.

(v) *Cooper v. Dawson*, 1 F. & F. 550. *Bartlett v. Smith*, 11 M. & W. 483.

(w) See *Cobbett v. Kilminster*, 4 F. & F. 490. *Arbon v. Fussell*, 3 F. & F. 152. *R. v. Aldridge*, 3 F. & F. 781. *Williams's case*, 1 Lew. 137. *R. v. Taylor*, 6 Cox, C. C. 58.

(x) *R. v. Silverlock*, 1894, 2 Q. B. 766.

If a person has been in the habit of spelling a word in an unusual manner, that is some evidence that a writing containing that word so spelled was written by that person, the value of such evidence depending on the degree of peculiarity in the mode of spelling and the number of occasions on which the person has used it; and the proof of such habit is not confined to the evidence of a witness who is acquainted with it from having seen the person write or correspond with him, but one or more specimens written by him with that peculiar orthography (*y*) will be admissible; for the object is not to shew similarity of the form of the letters and mode of writing of a particular word or words, but to prove a particular mode of spelling a word, which may be evidenced by the person having orally spelt it in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater the value of the evidence. Letters, therefore, written by a plaintiff, in which the defendant's name was improperly spelled 'Titchborne instead of Tichborne, were held to be admissible in evidence, in order to shew that a libel in which the name was spelt in the same erroneous manner was in fact written by the plaintiff. (*z*)

As to the examination of skilled witnesses as to genuineness of writing, see *post*, Book 6, ch. 5. s. 2.

In order to prove the contents of a telegram sent by the prisoner, the original should be produced and evidence given to shew that it was sent by him or by his authority, and the copy received through the office cannot be used until it is shewn that the original is destroyed. (*a*)

A copy of a parish register purporting to be signed by the curate eighty years ago may be received with no other proof of handwriting than the evidence of the present parish clerk, who speaks from his having seen the same handwriting attached to other entries in the register. (*b*)

**Unstamped documents.** — Formerly a written instrument, which required a stamp, was inadmissible, as a general rule, in criminal as well as civil cases, unless it were duly stamped, and no parol evidence could be received of its contents. But now by the 17 & 18 Vict. c. 83, s. 27, 'every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or affixed thereto.' (*c*)

**Banking books.** — By the Banker's Books Evidence Act, 1879 (42 Vict. c. 11), sec. 3, 'Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded.'

By sec. 4, 'A copy of an entry in a banker's book shall not be received in evidence under this Act, unless it be first proved that

(*y*) *Quære* 'cacography.'

(*z*) *Brookes v. Tichborne*, 5 Exch. R. 929.

(*a*) *R. v. Regan*, 16 Cox, C. C. 204.

(*b*) *Doe d. Jenkins v. Davies*, 10 Q. B. 314. As to proof of ancient writings, see

cases cited, *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 718.

(*c*) See the Stamp Act, 1891 (54 & 55 Vict. c. 39), sec. 14 (4), which, except in criminal proceedings, prevents unstamped documents being given in evidence.



the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.'

By sec. 5, 'A copy of an entry in a banker's book shall not be received in evidence under this Act, unless it be further proved that the copy has been examined with the original entry, and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.'

By sec. 6, 'A banker or officer of a bank shall not in any legal proceeding, to which the bank is not a party, be compellable to produce any banker's book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.'

**Court may order inspection.** — By sec. 7, 'On the application of any party to a legal proceeding, the court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.'

This section gives power to order inspection of entries in banker's books relating to banking accounts kept on behalf of a party to the action, although in the name of a person who is not a party. (*d*)

By sec. 8, 'The costs of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Act, shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, when the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceedings.'

By sec. 9, 'In this Act the expressions "bank" and "banker" mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings' bank certified under the Acts relating to savings' banks, and also any Post-Office savings' bank. The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue. The fact that any such savings' bank is certified under the Acts relating to savings' banks may be proved by an office or examined copy of its certificate,

the fact that any such bank is a Post-Office savings' bank may be proved by a certificate purporting to be under the hand of H. M. Postmaster-General or one of the secretaries of the Post-Office.'

Expressions in this Act relating to 'banker's books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

By sec. 10, 'In this Act the expression "legal proceeding" means any civil or criminal proceeding or enquiry in which evidence is or may be given, and includes an arbitration; the expression "the court" means the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken; the expression "a judge" means with respect to England a judge of the High Court of Justice. . . . The judge of a county court may, with respect to any action in such court, exercise the powers of a judge under this Act.'

By sec. 11, 'Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.'

## CHAPTER THE FOURTH.

OF CONFESSIONS AND ADMISSIONS, p. 477.—OF STATEMENTS OF THE ACCUSED BEFORE MAGISTRATES, p. 538—AND OF DEPOSITIONS, p. 549.

### SEC. I.

#### *Of Confessions and Admissions.<sup>1</sup>*

A FREE and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. (a)

(a) Gilb. Ev. 123. Lambe's case, 2 Leach, 552, 4th edition. Blackstone and Foster, JJ., entertained a different opinion. (See Fost. 243.) The former in the fourth volume of his Commentaries, p. 357, says, in speaking of confessions made to persons not in authority as magistrates: 'Even in cases of felony at common law, they are the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision, and incapable in their nature of being disproved by other negative evidence.' A distinction may be properly made in the weight to be attached to confessions. If a confession be reduced into writing, either by the prisoner, or by some one else, and read over to him, and it be clearly shewn that the confession was the spontaneous and voluntary act of the prisoner, such a confession would be entitled to great consideration. But if a confession were proved by a witness, and rested upon his capability of understanding what was said by the prisoner, his competency to remember the very words used, and his fidelity and accuracy in relating them to the jury, it ought to be received with very great caution. 'For,' as has been well observed (Greenleaf's Evid. 247), 'besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of

memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of persons necessarily called as witnesses in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection where in civil actions it would have been received.' The weighty observation of Foster, J., is also to be kept in mind, that 'this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted.' Fost. 243. Parke, B., has on several occasions observed that 'too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say.' Earle v. Picken, 5 C. & P. 542, note. R. v. Simons, 6 C. & P. 540.

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<sup>1</sup> See S. v. Guild, 5 Halst. 163. S. v. Welch, 7 Port. 463. Green v. S., 13 Mo. 382. Frank v. S., 39 Miss. 705. Joe v. S., 38 Ala. 422. S. v. Freeman, 12 Ind. 100.

Love v. S., 22 Ark. 336. Cobb v. S., 27 Geo. 648. Keenan v. S., 8 Wis. 132. Austin v. S., 51 Ill. 236. Teachout v. P., 41 N. Y. 7.

A confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence *aliunde*. (b)

A confession is obviously not conclusive evidence against a prisoner, and when it involves matter of law as well as matter of fact, is to be received with more than usual caution. Thus on an indictment for setting fire to a ship with intent to defraud Greenfell and Eddy, being part-owners of the ship, a declaration of the prisoner that Greenfell and Eddy were part-owners was received in evidence; but it was objected that the bill of sale, under which Greenfell and Eddy claimed, was invalid in point of law; and it was held that, if by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established, the declaration of the prisoner could not be relied upon for that purpose. (c) So where, on an indictment for bigamy, the prisoner had confessed the first marriage, but it appeared that the marriage was void for want of the consent of the guardian of the woman, the prisoner was acquitted. (d)

(a) *Confessions must be Free and Voluntary.*

But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence, (e) because

(b) *Wheeling's case*, in note, 1 Leach, 311. *R. v. Eldridge*, R. & R. C. C. R. 440. *R. v. Falkner*, *ibid.* 481. *R. v. White and Langdon*, R. & R. 508. *R. v. Tippet*, R. & R. 509. *R. v. Burton*, Dears. C. C. 282. *R. v. Tuffs*, 5 C. & P. 167. In *R. v. Edgar*, Monmouth Spr. Ass. 1831, MSS. C. S. G., the prisoner was indicted for obtaining money of a friendly society by false pretences; the rules of the society had not been enrolled, but the prisoner, who was a member of the society, had acted under them, and it was contended that he had thereby admitted their validity, and the position in the text was cited as a stronger decision; on which Patteson, J., said 'Could a man be convicted of murder on his confession alone, without any proof of the person being killed? I doubt whether he could.' In *R. v. Sutcliffe*, 4 Cox, C. C. 270, where a robbery had been committed on a moonlight night, Cresswell, J., left the case to the jury on confessions of the prisoner, though the prosecutor swore the prisoner was not one of the men who robbed him. The remark on this case is that the prosecutor *might* be in error; the prisoner *must* know whether he was guilty or not. In Ireland on the authority of these cases it has been held that a confession although extra judicial is sufficient without independent proof of the crime to sustain a conviction. *R. v. Sullivan*, 16 Cox, C. C. 347. It seems doubtful

whether in England the mere confession, if extra judicial, by a prisoner would be sufficient in itself to warrant a conviction. In the United States the prisoner's confession when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction. *Greenleaf's Evid.* 251, *Guild's case*, 5 Halst. 163, 185. *Long's case*, 1 Hayw. 524 (455). 2 Hawk. P. C. c. 46, s. 36.

(c) *R. v. Philp*, R. & M. C. C. R. 263.

(d) Anonymous, 3 Stark. Ev. 894, note (m), *cor. Le Blanc*, J.

(e) It is a mistaken notion that evidence of confessions obtained by promises or threats are to be rejected from regard to public faith. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. *Warickshall's case*, *Eyre and Nares*, BB., 1 Leach, 263. Three men were tried and convicted for the murder of Mr. Harrison, of Campden, in Gloucestershire. One of them, under

under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot safely be acted upon. (*f*)

The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. (*g*) In determining, therefore, whether a confession be admissible or not, 'the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one.' (*h*)

A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. (*i*) It is a question for the court, and not for the jury, to decide whether, under the particular circumstances of the case, the confession be admissible. (*j*)

The general principle on which the decisions on this subject seem to have proceeded seems to be this: that if, under the circumstances, there be reasonable ground for presuming that the disclosure was made under the influence of any promise or threat of a temporal nature, the evidence ought not to be received. (*i*)

There is a simple test by which the admissibility of a confession may be decided. Is it proved affirmatively by the prosecution that the confession was free and voluntary? that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of that statement is inadmissible. (*k*)

(*b*) *What Promises and Inducements will exclude Confessions.*

As to what shall be considered as a promise or inducement, saying to the prisoner that it would be better for him if he did confess is sufficient to exclude the confession. (*kk*) Where, on an indictment

the promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive. *Ibid.*, note (*a*).

(*f*) Per Lord Campbell, C. J., *R. v. Scott*, D. & B. 47.

(*g*) Per Littledale, J., in *R. v. Court*, 7 C. & P. 486, *post*, p. 480. But in *R. v. Baldry*, 2 Den. C. C. 430, Lord Campbell, C. J., said, 'The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury.' But see Lord Campbell's dictum, *R. v. Scott*, *supra*.

(*h*) Per Coleridge, J., in *R. v. Thomas*, 7 C. & P. 345.

(*i*) 2 Stark. Ev. 36.

(*j*) *R. v. Nute*, *post*, p. 495. In *R. v. Garner*, 1 Den. C. C. 329, Erle, J., said, 'In every case it is for the judge to decide whether the words were used in such a manner, and under such circumstances, as to induce the prisoner to make a confession of guilt, whether such confession were true or no.'

(*k*) Per Cave, J. *R. v. Thompson* (1893), 2 Q. B. 12.

(*kk*) 2 East, P. C. c. 16, s. 94, p. 659. *R. v. Fennell*, 7 Q. B. D. 147.

for robbery, a witness stated that he had said to one of the prisoners, 'You had better split, and not suffer for all of them,' the statement of the prisoner was rejected. (*l*) One of a firm who employed the prisoner, having called him up into the private counting-house of the firm, in the presence of another of the firm and two officers of police, said, 'I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue;' and having shewn a letter to him which he denied to have written, added, 'Take care; we know more than you think we know.' The prisoner thereupon made a confession. Held that these words did not import an inducement or threat, and that evidence of the confession was admissible. (*m*)

If a person advise a prisoner to be sure to tell the truth, and he then makes a statement, such statement is admissible on the ground that such advice cannot be supposed to induce the prisoner to confess that he is guilty of a crime of which he is really innocent. (*n*)

Upon an indictment for murder, it appeared that the prisoner, who was a boy of the age of fourteen, was taken into custody by Mr. Wragg, not a constable, and on the same night was in the parlour of the inn, to which he was taken; several persons, neighbours, but no constable, were in the room, and had been asking him questions about the children, whom he was charged with drowning. One Clark, who was present when Wragg took the prisoner up, and who was not a constable, stated, 'I told him to kneel down and tell the truth. Wragg took him into Adams' parlour, and began to question him how the children came to get into the pit; whether they fell in, or were put in; he said he should not tell anything about it. Wragg asked him if he would tell any one else, if he would go out of the parlour; the prisoner said nothing; Wragg then went out. I said to the prisoner, "Now kneel you down by the side of me, and tell me the truth." I believe this was the first thing. He did kneel down. I said, I was going to ask him a very serious question, and I hoped he would tell me the truth in the presence of the Almighty.

(*l*) *R. v. Thomas*, 6 C. & P. 353, Patterson, J. By such a statement as that made by the witness the prisoner *might* be induced to suppose that he would be more mercifully dealt with if he confessed, and that he might therefore be induced to confess himself guilty of an offence he never committed. See the Reporter's note, *ibid*. There are many similar cases to the above one: *Moody's case*, 2 Cawf. & D. C. C. Joy, 12. *R. v. Walkley*, 6 C. & P. 175. *R. v. Mills*, 6 C. & P. 146, and *MSS. C. S. G. R. v. Shepherd*, 7 C. & P. 579. *R. v. Kingston*, 4 C. & P. 387.

(*m*) *R. v. Jarvis*, 37 L. J. M. C. 1, *et per Kelly*, C. B., 'As to the words "you had better" referred to in the argument, there are many cases in which those words have occurred, and they seem to have acquired a sort of technical meaning, that they hold out an inducement or threat

within the rule that excludes confessions, under such circumstances. It is sufficient to say that those words have not been used on this occasion; and that the words used appear to me to import advice given on moral grounds, and not to infringe upon the rule of law prohibiting a threat or inducement in these cases.' See *R. v. Thompson*, *post*, p. 495.

(*n*) *R. v. Court*, 7 C. & P. 486, Little-dale, J. *R. v. Holmes*, 1 C. & K. 248; *R. v. Jarvis*, 37 L. J. M. C. 1, *per Kelly*, C. B.; *R. v. Sleeman*, *Dears. C. C.* 249, where the words were, 'Don't run your soul into more sin, but tell the truth,' and it was held there was no threat or inducement. An exhortation to speak the truth ought not to exclude a confession. See *per Erle, J.*, *R. v. Moore*, 2 Den. C. C. 522.

I then said, "Did these children fall into the pit?" He said he pushed one in with one foot, and the other with the other, but not purposely.' Mr. Moulden asked him if he had any malice or revenge; he said, No. Subsequently to this, the son of the innkeeper stated that next day the prisoner said he would tell him all about it. He neither promised nor threatened him. The prisoner then made a statement to him, which was given in evidence. Other declarations also were given in evidence. An examination of the prisoner, who could not write, was put in; it began, 'W. Wild being cautioned, &c.,' and the evidence being read over to him, said, 'I can give no other account than I have already given,' &c. (o) The prisoner having been found guilty, upon a case reserved as to the admissibility of the evidence, the judges present were unanimous that the confession was strictly admissible, but they much disapproved of the mode in which it was obtained. (p) The mother of a little boy in custody on a charge of attempting to obstruct a railway train, said to him and another little boy in custody also on the same charge, in the presence of the mother of the latter and of the policeman, 'You had better, as good boys, tell the truth,' whereupon both boys confessed. Held, that the confession was admissible. (q)

A confession induced by saying, 'I am in great distress about my irons; if you will tell me where they are, I will be favourable to you,' cannot be given in evidence. (r)

Where it appeared, on an indictment for larceny, that the prisoner, being in the custody of a constable, the latter said to the prosecutor, 'You must not use any threat or promise to the prisoner;' and immediately after this the prosecutor said to the prisoner, 'I should be obliged to you if you would tell us what you know about it; if you will not, we, of course, can do nothing; I shall be glad if you will.' The confession was held inadmissible; Patteson, J., saying, 'I think this is a distinct promise; what could the prosecutor mean by saying, that if the prisoner would not tell, they could do nothing, but that if the prisoner did tell, they would do something for him?' (s)

(o) The statement is given at length in the report, as well as the statement made to the innkeeper's son, but they are omitted, as nothing turned upon their contents. C. S. G.

(p) *R. v. Wild*, R. & M. C. C. R. 452. The conviction was affirmed, but the prisoner was transported for life. Lord Denman, C. J., Vaughan, J., Bolland, B., and Bosanquet, J., were not present at the meeting of the judges. The grounds of this decision are not stated in the report; but it should seem that the case may well be supported on the ground that the words addressed to the prisoner had no tendency whatever to induce him to make a false statement, but, on the contrary, were a most solemn adjuration to speak the truth. The decision seems fully warranted by the principle on which *R. v. Gilham*, *post*, rests. The decision, however, could hardly be supported on the ground that the inducement was held out by a person without authority, as it was held

out by a person present at the apprehension, and who was acting in concurrence with the party who apprehended him, and they were keeping the prisoner in custody, no constable being present. C. S. G.

(q) *R. v. Reeve*, 41 L. J. M. C. 92. *R. v. Parker*, L. & C. 42. But see *per* Maule, J., in *R. v. Garner*, 1 Den. C. C. 329, *R. v. Baldry*, 2 Den. C. C. 430; *per* Pollock, C. B., *R. v. Bale*, 11 Cox, C. C. 686.

(r) *Cass's case*, 1 Leach, 293, note (a).

(s) *R. v. Partridge*, 7 C. & P. 551. Dr. Greenleaf, *Evid.* 256, after citing this case, and *Guild's case*, *post*, p. 497, observes, 'It is extremely difficult to reconcile these and similar cases with the spirit of the rule as expounded by Eyre, C. B., in *Warickshall's case*, *ante*, p. 478, note (e); the difference is between confessions made voluntarily, and those "forced from the mind by the flattery of hope, or by the torture of fear." If the party has made his own calculation of the advantages to

Where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced, said, 'he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;' upon which the prisoner took 11s. 6½d. out of his pocket, and said it was all he had left of it; a majority of the judges held that the evidence was inadmissible. (t) Where also an attorney, who was endeavouring to discover some burglars for the purpose of prosecution, said to the prisoner, who had gone to him for the purpose of making some statements relating to the burglary, 'I dare say you had a hand in it; you may as well tell me all about it;' it was held that this excluded a statement then made. (u) So where a prisoner being in custody said to the officer who had the charge of him, 'If you will give me a glass of gin, I will tell you all about it,' and two glasses of gin were given to him, and he made a confession of his guilt; Best, J., considered it as very improperly obtained, and inadmissible in evidence. (v) But where a prisoner made a statement to a constable in whose custody he was, but he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so, and it was objected that what the prisoner said under such circumstances was not admissible; Coleridge, J., said, 'I am of opinion, that a statement being made by a prisoner while he was drunk, is not, therefore, inadmissible against him, and that, to render a confession inadmissible, it must either be obtained by hope or fear. This is matter of observation from me, upon the weight that ought to attach to this statement, when it is considered by the jury.' (w)

be derived from confessing, and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession. It seems that in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the Court, so far to overcome the mind of the prisoner as to render the confession unworthy of credit.' In *R. v. Green*, 6 C. & P. 655, Taunton, J., said, 'I take it no man ever makes a confession without proposing to himself in his own mind some advantage to be derived from it,' *post*, p. 485.

(t) *Jones's case*, R. & R 152, but see *R. v. Griffin*, *ibid.* 151, *post*, p. 523.

(u) *R. v. Croydon*, 2 Cox, C. C. 67. Rogers, Q. C., after consulting Platt, B.

(v) *R. v. Sexton*, MS. Chetw. Burn. tit. *Confession*, p. 1086, Doyl. & Wms. The authority of this case has been questioned in several books. Deac. Cr. Law, 424, Rosc. Cr. Ev. 37, Joy, 17, and it seems very justly. In the first place the offer to confess was volunteered on the part of the prisoner; secondly, there was no promise or threat at all used by the constable, nor was the prisoner in any way led to believe

that by confessing he would escape from the charge, or be let out of custody; thirdly, there was no inducement to state anything but the truth. In 1 Burn's J. Doyl. & Wms. 1081, note (a), it is said, 'The authority of this decision seems doubtful; for it is not every hope of favour held out to a prisoner that will render a confession afterwards made inadmissible; the promise must have some reference to his escape from the charge.'

(w) *R. v. Spilsbury*, 7 C. & P. 137.<sup>1</sup> In a note to this case, 1 Phill. Ev. 465, it is observed, 'The facts of the case as reported do not warrant the marginal note, which is as follows: "*Semble*, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up." It is not to be inferred from the case that a confession—so immorally, not to say criminally, extorted—would be received.' The principle, however, on which the decision turned would seem to warrant the marginal note, as the mere giving liquor without any inducement in words

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<sup>1</sup> See *Eshridge v. S.*, 25 Ala. 30. As to words uttered in sleep, see *P. v. Robinson*, 19 Cal. 40.



If an inducement be held out to one prisoner to make a statement, which implicates another prisoner, such statement is inadmissible; for it can only be used as evidence against the prisoner who made it, and then it is evidence obtained by an inducement. (x)

A prisoner, when before a magistrate, was told by the magistrate's clerk not to say anything to prejudice himself, 'as what he said would be taken down, and would be used for him or against him at his trial.' Coleridge, J., 'This is an inducement, and it was held out by a person in authority. I am of opinion that the prisoner's statement cannot be given in evidence. I cannot conceive a more direct inducement to a man to make a confession than telling him that what he says may be used in his favour at the trial.' (y) So where the constable who apprehended the prisoner said to him, 'What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else that may tend to injure you, but anything you can say in your defence we shall be ready to hear, and send to assist you;' a statement thereon made was rejected. (z) So where the constable told the prisoner, 'You are apprehended on a serious charge; take care that you do not say anything to injure yourself; but if you can say anything in your defence, we are willing to hear it, and to send to any person to assist you;' a statement thereon made was rejected. (a)

Where a police officer had told a prisoner that whatever he said would be used against him; it was held that a statement thereon made was admissible. (b) So where a police officer told the prisoner, before he made a statement, 'to be careful, it would be used against him on his trial if committed by the magistrates;' it was held that the statement was admissible. (c)

These cases were reviewed in the following case. Where, on an indictment for murder, a police constable said, 'I went to the prisoner's house. I saw the prisoner. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him.*' Objection was made that what the prisoner then said was inadmissible. Lord Campbell, C. J., thought that, although the caution of the constable differed from that directed by the 11 & 12 Vict. c. 42, s. 18, to be given by the justice to the prisoner in the word 'will' instead of 'may,' it did not amount to any promise or threat to induce the prisoner to confess; it could have no tendency to induce him to say anything untrue; and that in

could not operate as an inducement either by exciting hope of escape or fear of punishment. It is to be observed, also, that in all the cases where confessions have been excluded there has been an anticipation of benefit or injury *after* the confessing or non-confessing. Where liquor is given the benefit (if it can be called any) is received already, and nothing further is in expectation. C. S. G.

(x) R. v. Enock, 5 C. & P. 539.

(y) R. v. Drew, 8 C. & P. 140.

(z) R. v. Morton, 2 M. & Rob. 514, Coleridge, J., approving of R. v. Drew.

(a) R. v. Hornbrook, 1 Cox, C. C. 54, Coleridge, J.

(b) R. v. Chambers, 3 Cox, C. C. 92, Rolfe, B.

(c) R. v. Attwood, 5 Cox, C. C. 322, Erle, J. But see R. v. Toole, 7 Cox, C. C. 244, Irish.

spite of it, if he did afterwards confess, the confession must be considered voluntary. His Lordship, therefore, allowed the witness to give evidence of what the prisoner then said, which amounted to a confession of his guilt; and upon a case reserved, after argument on behalf of the prisoner, the judges were unanimously of opinion that the confession was properly received. Lord Campbell, C. J., 'I adhere to the opinion which I formed at the trial. The rule is, that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made a confession under a bias, and that therefore it would be better not to submit it to the jury.' Pollock, C. B., 'A simple caution to the accused to tell the truth, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence; (d) and although it may be put that where a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything, let it be true. But where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. (e) The true distinction between the present case and a case of that kind is, that it is left to the prisoner as a matter of perfect indifference whether he should open his mouth or not.' (f)

After the prisoner had been committed on a charge of murder, a fellow-prisoner said to him, 'I wish you would tell me how you murdered the boy;—pray split.' The prisoner said, 'Will you be upon your oath not to mention what I tell you?' The other prisoner went upon his oath, that he hoped, if he told, that he might never stir out of that place again. The prisoner then made a statement. It was held that this was not such an inducement as to render the statement inadmissible, and that, although such oaths were very wrong and wicked, still they were not binding; and that every person, except counsel and attorneys, were bound to reveal what they might have heard. (g).

Where a person said to a prisoner that he might say what he had to say to him, for it should go no further, and the prisoner thereupon made a statement, it was held that it was receivable in evidence. (h)

Where a prisoner and his wife were both in custody on a charge of receiving bank notes, but in separate rooms, and a person said to him, 'I hope you will tell, because the prosecutrix can ill afford to lose the money;' and the constable said, 'If you will tell where the property is, you shall see your wife;' Patteson, J., said, 'I think

(d) *R. v. Court*, 7 C. & P. 486. *R. v. Holmes*, 1 C. & K. 248.

(e) *R. v. Garner*, 1 Den. C. C. 329.

(f) *R. v. Baldry*, 2 Den. C. C. 430. *R. v. Furley*, and *R. v. Harris*, were cited and

disapproved of in this case, and can no longer be considered authorities.

(g) *R. v. Shaw*, 6 C. & P. 372, Patteson, J.

(h) *R. v. Thomas*, 7 C. & P. 345.

that this is not such an inducement as will exclude the evidence of what the prisoner said: it amounts only to this, that if he would tell where the money was he should see his wife.' And the statement made by the prisoner was received. (i)

So where a constable told a prisoner that his father had been charged with murder. He had been previously cautioned not to criminate himself, as the witness would bring it all against him. The prisoner said he hoped no one would be charged with the murder but himself, and then made a confession. Doherty, C. J., having conferred with Torrens, J., admitted the confession, observing that, although such announcement was likely to act upon the feelings of the prisoner, he would not be warranted on that ground in refusing to receive it. (j) So where the prisoner was indicted for concealing the birth of her child, a medical witness said that he examined the prisoner in custody, and found that her breasts were full of milk, and asked her whether she had not recently had a child, and added that if she refused to tell he would examine her person more closely; the prisoner then said, 'It is unnecessary to examine me, for I had a child.' Torrens, J., admitted this confession, on the ground that the witness was endeavouring to ascertain a fact within his own province, and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes confessions. (k)

Upon an indictment for housebreaking, it appeared that the prisoner being in the shop of the prosecutor, handcuffed, some recommendations to confess had been, in the absence of the prosecutor, made to him by the person who had been left in charge of the house; and the prisoner said, that if the handcuffs were taken off he would tell where he put the property. He had expressed doubts whether, if he told where the property was, he could rely on being leniently dealt with, and, after the prosecutor came in, he was told that they would do all they could for him. It was objected that the statement was inadmissible, as it was made under duress, and to deliver himself from the confinement. Bosanquet, J., 'I do not think there is anything in the objection, but I will take a note of it.' Taunton, J., 'I take it no man ever makes a confession voluntarily, without proposing to himself in his own mind some advantage to be derived from it.' The statement was received. (l)

It is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody; not even though some artifice has been used to draw him into that supposition. (m)

Jacobs and Tarrant, two apprentices, were indicted for stealing from their master, who, suspecting Tarrant, told him that if he did not confess he would send for a constable. Jacobs could hear what was said. Tarrant said he had robbed the prosecutor, and that Jacobs

(i) *R. v. Lloyd*, 6 C. & P. 393.

(j) *Nolan's case*, Joy, 16. 1 *Crawf. & Dix*, C. C. 74.

(k) *Cain's case*, Joy, 16. 1 *Crawf. & Dix*, C. C. 37.

(l) *R. v. Green*, 6 C. & P. 655. The statement did not amount to a confession, and Bosanquet, J., desired the jury to lay it out of their consideration.

(m) *R. v. Burley*, 1 Phill. Ev. 406.

had robbed him too. Jacobs said, 'You are a liar; I have only taken one handkerchief.' It was held that the statement of Jacobs was admissible; for an inducement or threat offered to one person cannot affect the admissibility of a confession made by another, although that other be present when the inducement is offered. (*n*)

In a case (*o*) where the prisoner, while in gaol, asked the turnkey if he would put a letter into the post for him, and, after his promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, gave it to the visiting magistrates of the gaol, who gave it to the prosecutor; Garrow, B., held that the letter so obtained was admissible in evidence, and said he remembered making an objection, when at the bar, to evidence under the same circumstances before Gould, J., who overruled it.

A confession made by the prisoner with a view and under the hope of being thereby permitted to turn king's evidence, has been held inadmissible. (*p*) On an indictment for murder, it appeared that the prisoner was taken into custody on the charge on the 2nd of December, and that on the 11th he made certain statements, which were sought to be given in evidence. To prove one of these statements, a policeman was called, who said that he held out no inducement to the prisoner to make any statement, nor did he know that any one else had done so to the 11th of December, when the statement was made; but on the 6th of December he knew that a reward of £100 had been offered by the government, accompanied by a statement that the Secretary of State would recommend an accomplice, not being the person who actually committed the murder, for a pardon, but the witness could not state that this had come to the knowledge of the prisoner; and Cresswell, J., allowed this statement to be given in evidence. In a later part of the same case a policeman stated, that soon after the prisoner had been taken into custody, and before the 6th of December, the prisoner requested that he would let him know if any reward should be offered, or any papers published concerning the murder, and that he would bring any such papers to him as soon as they were printed. On the 6th of December, it was generally known that the Secretary of State had offered a reward and a promise of free pardon to any of the offenders, except such as had struck the blow, and on the 13th the witness gave the prisoner one of the printed handbills, which offered £100 reward to any person who should give such information as should lead to the discovery and conviction of the murderers, and 'a pardon to an accomplice, not being the person who actually committed the murder, who shall give such information as shall lead to the same result.' Cresswell, J., after consulting Patteson, J., held that a statement made by the prisoner to the witness on the 11th of December was receivable. In a still later part of the same case, it appeared that on the evening of

(*n*) *R. v. Jacobs*, 4 Cox, C. C. 54; *R. v. Bate*, 11 Cox, C. C. 686. But see now *R. v. Thompson*, *post*, p. 495.

(*o*) *R. v. Derrington*, 2 C. & P. 418, Garrow, B.

(*p*) Hall's case, in note to *Lambe's case*, 2 Leach, 559. But where a person had

been admitted king's evidence, and confessed, and upon the trial of his accomplices refused to give evidence, he was convicted, upon his own confession. *R. v. Burley*, 2 Stark. Ev. 13. See *R. v. Gillis*, 11 Cox, C. C. 69.

the 10th of December, the prisoner said that he saw no reason why he should suffer for the crime of another, and as government had offered a free pardon to any one of the parties concerned, who had not struck the blow, he would tell all he knew about the matter. Cresswell, J., 'It now appears, with sufficient clearness, that the prisoner in making the statements ascribed to him was influenced by the hope of pardon held out by authorised parties. I shall, therefore, reject the evidence of all statements made by him after the evening of the 10th of December, and expunge from my notes such as have already been given in evidence.' (q)

Upon an indictment for murder, it appeared that the prisoner sent to the chaplain of the gaol, and said he thought it was very hard that some of the prisoners should have their lives taken away wrongfully, and asked the chaplain if any magistrate would come that day, as he wished to see a magistrate to make a statement respecting the charge; and then said, 'Has any proclamation been made, or any offer of pardon?' The chaplain said proclamation had been made some time, and an offer of pardon. The prisoner then said if any person should make known the circumstances, it would be impossible for him to go back to Pershore. The chaplain said that any person who made such a statement would probably not think of going back to Pershore, and that if he made a statement the chaplain hoped that he would understand that he could offer him no inducement, as it must be his own free and voluntary act. When the prisoner asked if there was a proclamation, there was something said that the reward would enable a person to go elsewhere. A magistrate came in about three-quarters of an hour, and what passed between him and the prisoner, before the latter made a statement, was reduced to writing as follows: 'The voluntary information and confession,' &c., 'who saith, in answer to questions put by the said magistrate: "I wish to make a statement of what I know. I have told the chaplain so, and desired him to send for a magistrate. No person has made any promise or held out any inducement; what I have said to the chaplain, and what I am about now to say, is my own free and voluntary act and desire."' The said magistrate having read over to the said prisoner the foregoing statement, informed him he was at liberty to say anything he might wish, and that it would be the said magistrate's duty as a magistrate to take it down in writing. The said prisoner voluntarily saith as follows,' [here followed the statement]. It was urged that this statement ought not to be admitted, as it was manifest that the motive which induced the prisoner to make it was the offer of pardon. It was clear he made it to save himself by means of the pardon. Pollock, C. B., 'I collect from the decision in *R. v. Boswell*, (r) that before a statement can be excluded on the ground that it was made in the hope of a pardon, it must appear that that motive was operating on the prisoner's mind, and in that case, up to the moment when that was shewn, my Brothers Patteson and Cresswell held the statements of the prisoner to be receivable, though the prisoner knew of the reward and the promise of a pardon having been offered by the Secretary of State; but when it appeared that Boswell had made the communication, stating "he saw no

(q) *R. v. Boswell*, C. & M. 584.(r) *Supra*.

reason why he should suffer for the crime of another, and that, *as* government had offered a free pardon to any of the parties concerned, who had not struck the blow, he would tell all about the matter," it was held that the statement was inadmissible, as it appeared that the prisoner was influenced by the hope of pardon held out by authorised parties. In the present case the chaplain said to the prisoner, after the pardon had been alluded to, that he hoped he would understand that he, the chaplain, could offer him no inducement; it must be his own free and voluntary act, and what the magistrate said to him is very nearly to the same effect. I think that the statement of the prisoner must be received.'<sup>(s)</sup>

Moore and Blackburn were tried for a murder. The chief constable had received three anonymous letters: No. 1 on the 29th of October, No. 2 on the 3rd of November, and No. 3 on the 8th of that month; on the 12th Moore was examined as a witness against Blackburn before the magistrates; and, on his leaving, the chief constable told him that he was not satisfied with the way he had given his evidence; Moore said that he had more to state, and was desired to put it on paper, and the next day a paper was produced, which Moore said he had written. The chief constable then said, 'I arrest you as the writer of several anonymous letters, shewing a guilty knowledge of the murder.' Moore said he had written the letters Nos. 1 and 2, and the chief constable believed No. 4 to be in his handwriting. A large reward had been offered to any one giving private information of the murder, and a reward and free pardon by government for any accomplice not the actual murderer; and a handbill had been circulated, dated November 4, stating these rewards and pardon. Moore had received a shilling a day by the direction of the chief constable whilst he was a witness, as he stated he was starving. The chief constable told Moore repeatedly, when he was treated as a witness, that he must speak the truth; but he never offered him any inducement to make any statement. It was held that these letters and statements were admissible; they were not confessions, but merely statements made to get others implicated. The governor of the gaol, from notes made at the time, afterwards deposed to a statement made by Moore in the magistrate's room at the gaol, four days after he was charged with the murder; at this time a printed copy of the handbill offering the rewards and pardon was hanging up in the room, and the contents were known to the prisoner, who frequently, both before and after this statement, asked the governor whether he thought he (the prisoner) could give evidence, but he never said that he made the statement in that expectation, or in hope of getting the reward, and the gaoler on all occasions told him, before he said anything, that his statements would be used against him. Talfourd, J., received the statement at the time; but the following morning stated that he had consulted Williams, J., and, upon mature consideration, they considered that all the statements were admissible, with the exception of that made to the gaoler. As it appeared that at the time it was made the handbill was in the room, and the prisoner had the notion that he would be admitted as a witness for the Crown, they were of opinion, on

(s) *R. v. Dingley*, 1 C. & K. 637.

mature consideration, that this statement was inadmissible, and he should therefore expunge it from his notes. (t)

The prisoner, who was indicted with several others for burglary, sent for a magistrate to tell him he had something to communicate to him. The magistrate acted at the interview with great caution, and warned the prisoner not to say anything that would criminate himself, as what he said would be taken down in writing, and made use of against him on his trial. The prisoner replied he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person, charged with the same crime, who had confessed and been admitted queen's evidence; the prisoner was aware of this, and it was to that he alluded when he said that he knew the witness knew all, and that it was from the statement made by the person who had been admitted queen's evidence that the prisoner was examined, and his confession taken down. It was insisted that, under these circumstances, the confession was not admissible, as the caution given by the magistrate did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to believe that if he made a confession he would be put in the same situation with the other person who had done so. Crampton, J., received the confession, observing that the magistrate stated that, as far as he knew, the prisoner came forward voluntarily; that a mere formal caution from a magistrate would not be sufficient to set up a confession, if it appeared that such confession was made under the distinct impression of a previous promise or threat but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate was sufficient to obviate them. It was in effect telling the prisoner that he would get no benefit from his confession, and that he should consequently dismiss from his mind all expectation of getting any, if any such he had. (u)

The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf that one of them had improperly induced him to confess, and this constable was called, and stated that the prisoner was in his custody on another charge, and was not suspected at that time of the offence for which he was on his trial, and that he made a statement. It was submitted that if a promise was held out to him, it was immaterial what the charge was. Littledale, J., 'I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge.' The confession was admitted. (v)

(t) *R. v. Blackburn*, 6 Cox, C. C. 33.

(u) *Berigan's case*, Joy, 27. 1 Ir. Circ. Rep. 177. In this case there were similar confessions made by all the prisoners, under circumstances precisely similar, and they were all admitted. 'It is not improbable,' observes Mr. Joy, 'that in this case the prisoner was induced to make the confession

by what his fellow-prisoner had done, and by his having been admitted queen's evidence, but no promise, threat, or inducement was held out by any person in authority calculated to make his confession untrue. Joy, 28.

(v) *R. v. Warner and Morgan*, Gloucester Spr. Ass. 1832. MSS. C. S. G.

But where several felonies form part of the same transaction, an inducement held out as to one will exclude a statement as to another. (*w*)

Upon an indictment for murder, it appeared that the prisoner and the deceased had been in the service of Mrs. Coxe, at Bath. The deceased was murdered in the night of the 26th of January, and the prisoner was apprehended on the 30th of that month, and some articles belonging to Mrs. Coxe afterwards found in a room hired by him. When in gaol, the prisoner had the Bible and the Whole Duty of Man by him; the gaoler pointed out several passages for him to read in the Prayer Book, particularly the opening sentences of the service, and told him if he wished to have a spiritual adviser he would endeavour to get him one; and after some conversation the prisoner expressed a wish to have the chaplain of the gaol. The chaplain went to the gaol, and asked the prisoner why he sent to him; the prisoner answered, to read and pray with him, as he could not do it himself, or make use of the books which were lying before him, which were the Bible, Prayer Book, and Whole Duty of Man. The prisoner said he knew he was a sinner, and should soon die. The chaplain asked him how he knew it; he replied, he had been told at the Hall he should be hanged for taking the goods of his mistress; and he then admitted that he had purloined a few things from her. The chaplain saw he was in a very perturbed and distressed state of mind, and asked him if there was not something still more heavy on his conscience; he said he knew he was a sinner as other men, and he knew he was suspected of the unhappy murder. The chaplain told him, if he was innocent to maintain his innocence; but if not, his own heart would tell him. The chaplain, as the minister of God, thought it was his duty to warn him not to add sin to sin, by attempting to dissemble with God. The chaplain then asked him, as he confessed himself a sinner, and as he thought he should soon die, whether he would not wish to repent of his sins; he answered in the affirmative. The chaplain then explained to him what he considered to be the nature of true repentance; and, amongst other things, that it was not a mere acknowledgment of sin, but a deep search into ourselves, and by the purity of the Gospel, whenever we found ourselves deep defaulters, to confess the same before God, with a deep contrition on our part for having violated the law of God. The chaplain told him, that before God it would be better for him to confess his sins. The chaplain also told him, that, next to confessing his sins before God, another most important part of the duty of repentance was to repair, by all possible means in his power, every injury of whatsoever nature he had done to his fellow-creatures; he enlarged very considerably on his repairing the injuries he had done his fellow-creatures, as forming a branch of true repentance; and he said he might say, and repairing any injury done to the laws of his country. The chaplain stated that the prisoner was then extremely agitated; he read to him part of the Commination Service, commenting upon it as he went along. He thought at one time that the prisoner was on the point of making some immediate communication to him, and he asked him if he should send for Mr. Bourne (the gaoler), meaning

(*w*) *R. v. Hearn*, C. & M. 109.



it with a view of the prisoner making a communication to Bourne, because he considered he had made a great impression on the prisoner. The chaplain stated the prisoner's agitation and perturbed state of mind during the interview was so great that he could not help being aware that the prisoner had something pressing on his mind; and the chaplain said while that was the case he could tell the prisoner, and the prisoner would feel, that no services of his would afford him, what he wished they should do, real comfort; telling him also he must be aware that he, as a minister of God, had but one object in view, to bring him to a state of true repentance; and that he could not but himself feel sensible that he was more concerned in the dreadful deed than he had admitted: that he did not wish him to confess to him, but to bear in mind the subject on which he had talked to him and read to him. The prisoner was evidently so worked upon by what had been said, that the chaplain could not but observe it to him, and asked him whether his conscience did not bear witness to the truth of what he had advanced. The chaplain soon after left him, the prisoner having expressed a wish to see him again. He then went and reported to the magistrates what had passed between them; and having recovered himself a little from the agitation he was in from so painful an interview, went to the prisoner again a little before three on the same day, and resumed the tenor of his conversation upon repentance, and confessing his sins before God, and repairing, by every possible means, any injury he had done to his fellow-creatures. As the prisoner had himself alluded to the murder, the chaplain entreated him, if he knew himself guilty, to avail himself, by the means of general repentance and faith in Christ, to be reconciled with God. At one time, during this interview, the chaplain saw so evident an impression made on his mind, that he could not but tell him, his fear, which he had expressed to the prisoner in the morning, respecting his participation in the dreadful deed, was fully confirmed; and that while he was in that state of mind, he (the chaplain) could not afford him the consolation by prayer, which it was his earnest wish to do, and so that his prayers could be of any avail to him; and he soon after left the prisoner. The first interview lasted about two hours, and the second about an hour and a quarter, and during these interviews the chaplain enlarged upon the topics mentioned to the prisoner. The chaplain said he could almost take upon himself to say, that he always used the terms, 'confessing his sins before God;' but he afterwards said that he could not say, that he mentioned 'before God' every time he used the word 'confessing.' After the second interview, the gaoler saw the prisoner, and told the prisoner what had passed between him, the gaoler, and the prisoner's wife; and he also told the prisoner, that he was perfectly satisfied that what he, the gaoler, said in the morning was correct. The prisoner then said he would tell the gaoler all about it. The gaoler said to him, 'Don't tell me anything but what you would wish the mayor and magistrates to know, for whatever you tell me I must inform them of.' The prisoner then related to the gaoler the particulars of the murder, and the way in which he had committed it. The gaoler then said to him, 'Now I shall tell all this to the mayor and magistrates.' The prisoner then said, 'That is what I wish;' he said he

had endeavoured to make up his mind to confess before; he had a great mind on Monday. He then requested the mayor should come and hear what he had to say: and particularly wished to see the clergyman again. The next morning (Saturday) the gaoler saw him again, and read to him two prayers and a psalm: he said he felt himself a good deal easier in his mind. The mayor of Bath and town clerk came about ten o'clock. The prisoner, before he saw them, told the gaoler that some part of what he had stated the night before was not correct, as to what part of the house he met the deceased in when he first struck her, and he said it was in another part of the house. When the mayor saw the prisoner in the gaoler's room, he said, 'I am come to see you, as I understand you wish to make some communication to me.' The mayor then said to him, 'Before you say anything, I think it necessary to apprise you, as I have done several times during your examination, that it will probably be given in evidence against you. You are, therefore, to use your own discretion, and say little or nothing, as you may think best; and if you have changed your mind since you sent to me, and do not choose to say anything, I will retire, and shall not feel at all angry with you for having brought me down unnecessarily.' The prisoner said something; what he said was taken down in writing, in his own words; it was read over to him by the town clerk, and the clerk asked him if he had any objection to sign it: he said he had not any, but his hand shook so much he could not write his name, but it was all true. The mayor then signed the examination, but it was not signed by the prisoner. This examination of the prisoner was read; and it contained a confession of his having committed the murder, and the circumstances attending it. It appeared that the prisoner had undergone five or six examinations, including the coroner's inquest. In the course of the same morning, after the mayor was gone, one of the mayor's officers saw the prisoner, and in answer to a question how he was, the prisoner told him he was better since he had eased his mind; and in the conversation they had, he told the officer that he had committed the murder, and related some of the particulars. The next morning (Sunday) the prisoner was taken from Bath to the county gaol by another of the mayor's officers, and in answer to an inquiry how he felt, he said he felt a good deal better since he had relieved his mind; and in the course of their journey he told this last-mentioned officer that he had committed the murder, and stated some of the particulars. It was contended on the part of the prosecution that, even supposing the confession made to Bourne, the gaoler at Bath, immediately after the chaplain's interview with the prisoner, were not receivable in evidence, still that the confession made to the mayor was receivable, inasmuch as the mayor cautioned him against saying anything, unless he thought it right, and that what he said would probably be given in evidence against him. But Littledale, J., thought that, after what the chaplain had said to him, nothing that the mayor said could do away the effect which the chaplain had produced in his mind, and that it differed from those cases where a confession having been made under circumstances which prevented its being received in evidence, if a magistrate has cautioned a prisoner not to say anything against himself, a subsequent confession made before a magistrate has been admitted in evidence. The learned

judge received the confessions in evidence, and the prisoner was found guilty. But the point was reserved for the consideration of the judges; before whom it was argued. (y) The judges were of opinion that the confessions had been properly received, and that the conviction was right; upon the ground, it is understood, that there were no temporal hopes of benefit or forgiveness held out, and that such hopes, if referable merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded. (z)

(c) *What Threats and Menaces will exclude a Confession.*

As to what shall be considered as a threat, saying to a prisoner that it would be worse for him if he did not confess, is sufficient to exclude a confession. (a) So a confession induced by saying, 'Unless you give me a more satisfactory account, I will take you before a magistrate,' or (b) by saying, 'That unfortunate watch has been found, and if you do not tell me who your partner was I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face,' (c) cannot be given in evidence. So where a prosecutrix said to her servant girl, who was in custody on a charge of administering poison to her, 'Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge to the magistrates, and not return again.' The girl answered, 'Sooner than I will go from here or anywhere else, I will tell the truth;' and the prosecutrix said, 'That is what I want,' and the prisoner then made a statement; it was held that the statement was inadmissible, because it was made to prevent her being taken before the magistrates. (d)

A boy between eight and nine years old was thus questioned by a policeman: 'Have you ever been to school?' He said, 'Yes.' 'Do you know what will become of you if you tell a falsehood?' 'Yes; I shall go to hell.' 'Do you think God knows everything that is done?' 'Yes.' 'Do you think he knows who set fire to the haystack?' The boy did not answer, but began to cry. The policeman then asked whether he could give any information about the fire,

(y) The following authorities were cited: *R. v. Radford*, tried at Exeter Summer Assizes, 1823, where a clergyman had prevailed on the prisoner to confess a murder, by dwelling on the heinousness of the crime, and the denunciations of Scripture against it, without giving him any caution that it would be used in evidence against him, and *Best, C. J.*, refused to allow the clergyman to state the confession; saying that he thought it dangerous after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced, to allow what he then said to be given in evidence against him. But it is said that this case was not determined on this ground; but that *Best, C. J.*, thought that it was improper in the clergyman to

violate the confidence reposed in him by the prisoner, and expressed a strong opinion to that effect; and as the evidence was not wanted for the Crown, it was not pressed, and the prisoner was convicted without it. *R. v. Sparkes*, cited *Peake, N. P. R. 78. Williams v. Williams*, 1 Hagg. 304.

(z) *R. v. Gilham, R. & M. C. C. R. 136.*  
(a) 2 East, P. C. c. 16, s. 94, p. 659. *R. v. Coley*, 10 Cox, C. C. 536.

(b) *Thompson's case*, 1 Leach, 291.

(c) *R. v. Parratt*, 4 C. & P. 570, *Alderson, J.*

(d) *R. v. Griffiths*, MSS. C. S. G. Worcester Sum. Ass. 1832, *Bosanquet, J. S. C.* as *R. v. Richards*, 5 C. & P. 318. See this case more fully, *post*, p. 501.

and told him, before he made any statement, he should apprehend him upon a charge of setting fire to Mr. Wright's ricks. After that the boy made a statement. Cresswell, J., after consulting Williams, J., said, 'It seems to us both too hazardous to admit this evidence. It is impossible not to say that what passed may have acted upon the boy's mind as a threat.' (e)

Where the prisoner was indicted for sheep-stealing, and, prior to his examination before the magistrate, his wife volunteered a confession of the particulars of the robbery; and on the prisoner being brought up for examination, the magistrate told him that his wife had already confessed the whole, and that there was quite case enough against him to send a bill before a grand jury, and then asked him what he had to say. The prisoner immediately confessed his guilt, and stated several facts which had been previously deposed to by his wife. It was objected that this confession could not be received, inasmuch as the magistrate's address to the prisoner when he was brought before him to be examined was in the nature of a menace. But Parke, J., overruled the objection, saying he considered it rather as a caution. (f)

The words, 'I must know more about it,' said by a police constable to a prisoner in the course of a conversation between them respecting the subject matter of the charge, immediately before apprehension, were held not to exclude an admission. (g)

Prosecutrix lost her purse, containing £1 4s., in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen any one pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman a short time after went in search of prisoner, and having found him told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, 'Now is the time for you to take it back to her.' He denied having it, and went with the policeman. As they walked along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about six hundred yards, some conversation took place, and the prisoner was searched, and on a half a sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, 'Now is the time to take it back to her,' and the prisoner's statement, 'That he would make it all up to her.' Held that there was no inducement held out to the prisoner, and that his statement or confession that he would make it all up to her was admissible in evidence against him. (h)

If the words used to a prisoner be such that he might consider them as a threat, a confession is not admissible. The prisoner being in custody on a charge of arson, he was told that 'he ought to tell whatever was the truth, but he must be very careful, as he was sure to be committed,' on which he made a statement. Taunton, J.,

(e) *R. v. Day*, 2 Cox, C. C. 209. *R. v. Griffiths*, *supra*, and *R. v. Hearn*, C. & M. 109, were cited.

(f) *Wright's case*, 1 Lew. 48. See *R. v. Long*, 6 C. & P. 179.

(g) *R. v. Reason*, 12 Cox, C. C. 228.

(h) *R. v. Jones*, 12 Cox, C. C. 241.

doubted whether the words used might not be construed as a threat and having consulted Littledale, J., said, 'We think as the words were so ambiguous that they might be considered by the prisoner as a threat, the evidence ought not to be given.' (i)

Where a prisoner has been taken into custody by a constable without a warrant, and detained by him in durance for four days, and during his confinement a confession was obtained under certain promises, and on the part of the prosecution it was attempted to be shewn that the confession was voluntary, and not made under such promises; Holroyd, J., said, 'Even if that were so, the fact of its having been made while in unlawful custody renders it unavailing;' and there being no sufficient evidence without it, he directed an acquittal. (k)

The law on the subject of confessions has recently been discussed in a case in the Court for Crown Cases Reserved, in which it was held that a statement by the prosecutor to the prisoner's brother that it would be the right thing for his brother to tell the truth, was sufficient inducement to render a subsequent confession by the prisoner inadmissible. (l)

(d) *Confession made after former one unduly obtained, or after Inducements once made.*

If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted as evidence.

Where an inducement which would exclude a confession has been held out to a prisoner, there ought to be clear evidence to shew that the impression caused by it has been removed before a subsequent confession made at a different time is admitted as evidence. (m) The cases upon this subject are conflicting. But certain general rules and principles can be deduced from the following cases. The question whether the confessions can be received in evidence is for the judge, and each case must be determined upon its own facts.

In the case of *R. v. Nute*, (n) the prisoner was suspected of setting fire to an outhouse; her mistress pressed her to confess, and told her, among other things, if she would repent and confess, God would forgive her, but she concealed from her that she would not forgive her herself: she confessed. The next day, another person,

(i) *R. v. Williams*, Gloucester Spr. Ass. 1832, MSS. C. S. G.

(k) Ackroyd's case, 1 Lew. 49. This decision has been questioned, and it has been observed that 'if the prisoner were to believe the apprehension unlawful, that would make him careful not to disclose anything against himself; if he should suppose it lawful, that also would make him careful not to make his situation worse, nor in any respect to prejudice himself.' 1 Phill. Ev. 407, and see *R. v. Thornton*, R. & M. C. C. R. 27.

(l) *R. v. Thompson*, 1893, 2 Q. B. 12, per Lord Coleridge, C. J., Hawkins, Cave, Day, and Wills, JJ. This decision would appear to overrule many of the old cases such as *R. v. Jarvis*, ante, p. 480, *R. v. Reeve*, ante, p. 481, etc., and to render many confessions which would formerly have been received inadmissible.

(m) See 2 East, P. C. 658. *Bell's case*, Joy, 71.

(n) 1 Burn. J., Doyl. & Wms. 1086.

in her mistress's sight, though out of her hearing, told her her mistress said she had confessed, and drew from her a second confession. Lord Eldon, C. J., allowed the confessions in evidence, and the prisoner was convicted. The jury, on having the confessions put to them, said they thought the first confession made under a hope of favour here, and the second under the influence of having made the first. On a case reserved, the judges held that these points were not for the jury, but if Lord Eldon agreed with the jury, which he did, the confessions were not receivable; but many of them thought the expressions not calculated to raise hope of favour here, and, if not, the confessions were evidence. So in *R. v. Sexton*, (o) a confession had been improperly obtained by giving the prisoner two glasses of gin: the officer to whom it had been made read it over to the prisoner before the committing magistrate, who told the prisoner the offence imputed to him affected his life, and a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the paper. Best, J., considered the second confession, as well as the first, inadmissible; and said, that had the magistrate known the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said could not be given in evidence against him, and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would be evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate.

Upon an indictment for murder it appeared that the prisoner worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own; and added, 'There is no doubt thou wilt be found guilty; it will be better for you if you will confess.' A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, 'Robert, do not make him any promises.' The prisoner then made a confession. Patteson, J., 'That will not do. The constable ought to have done something to remove the impression from the prisoner's mind.' The overlooker, in about ten minutes, delivered the prisoner to the constable of the township. The constable stated, that when he received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. That he took the prisoner to his house, and there said, 'I believe Sherrington has murdered a man in a brutal manner.' That the wife and brother of the prisoner were there, and said to the prisoner, 'What made thee go near the cabin?' That the prisoner in answer made a statement similar in effect to the one he had made before. That he used neither promise nor threat to induce the prisoner to say anything. But that he did not caution him. That it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. That

(o) 1 Burn. J., Doyl. & Wms., 1086.

he was not aware that the overlooker had held out any inducement. That the overlooker was not present when the statement was made. For the prisoner it was submitted that the second confession must be taken to have been made under the same influence as the first. Patteson, J., 'There ought to be strong evidence to shew that the impression under which the first confession was made was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination;' and the statement was rejected. (*p*)

Where the prisoner had been induced by promises of favour to make a confession, which was for that cause excluded, but about five months afterwards, and after having been solemnly warned by two magistrates that he must expect death, and prepare to meet it, he again made a full confession, this latter confession was admitted in evidence. (*q*) In this case, upon much consideration the rule was stated to be that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the Court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. (*r*) In the absence of any such circumstances the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shewn by clear evidence, and the confession will therefore be rejected. (*s*)

Although such improper inducements may have been held out to a prisoner as would exclude a confession made under their influence, yet if the Court, taking into consideration all the circumstances of the case, should be of opinion that at the time a confession was made such inducements had ceased to operate upon the mind of the prisoner, such confession will be admissible. In determining whether an inducement has ceased to operate, it will be material to consider the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, the time which has intervened between the inducement and the confession, and whether there has been any caution given, and if so, whether that caution has been given generally, or expressly and specifically with reference to the inducement held out. Thus where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under

(*p*) *Sherrington's case*, 2 *Lew.* 123. *Meynell's case*, 2 *Lew.* 122; *R. v. Hewett*, C. & M. 534.

(*q*) *Guild's case*, 5 *Halst.* 166, 168, as stated, *Greenl. Ev.* 257.

(*r*) *Greenl. Ev.* 257, citing *Guild's case*, 5 *Halst.* 180.

(*s*) *Greenl. Ev.* 257, citing *Roberts' case*, 1 *Devereux R.* 259, 264. *R. v. Rue, Denman, J.*, 13 *Cox, C. C.* 209.

these circumstances before the magistrate was held to be clearly admissible. (t)

Where it appeared that a constable told the prisoner he might do himself some good by confessing; and the prisoner afterwards asked the magistrate if it would benefit him to confess; on which the magistrate said he could not say it would, and the prisoner then declined confessing; but afterwards, in his way to prison, he made a confession to another constable; and he confessed again in prison to another magistrate; the judges were unanimous in holding that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. (u) Nor is it any objection to a confession made before a magistrate, that the prosecutor who was present first desired the prisoner to speak the truth, and suggested that he had better speak out, provided the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but to say what he thought proper. (v)

Where the prisoner has been duly cautioned by the magistrate, in pursuance of 11 & 12 Vict. c. 42, s. 18, *post*, anything said by him thereupon is admissible in evidence against him, although there may have been a previous promise or threat held out to him to induce him to confess. (w) That the caution has been given requires no further proof than the fact of its appearing to have been so given on the face of the prisoner's statement, returned together with the depositions. (w)

Where before the above Act it appeared that, before a prisoner was asked what he had to say, he was particularly cautioned by the magistrate not to say anything that would injure himself, for whatever he said would be taken down, and given in evidence against him; but it also appeared that a constable, who had previously induced the prisoner to make a confession to him by telling him it would be better to confess, had been examined before the magistrate, and in his examination had stated that he had told the prisoner that it would be better to confess, and had also stated all the prisoner had said to him in consequence; all which had been taken down, and read over to the prisoner, before he made his statement; Littledale, J., refused to allow the statement to be given in evidence, as the caution given by the magistrate was not sufficient to obviate the effect of the inducement used by the constable. (x) But where a constable proved that he had given the prisoner a handbill, offering a reward to any accomplice who would give information on the subject of the robbery, and the handbill was read over to the prisoner, who made a statement, which the constable took in writing; (y) when the prisoner was examined before the magistrate this

(t) *R. v. Lingate*, 1 Phill. Ev. 410, Bayley, J. See *R. v. Howes*, 6 C. & P. 404, Lord Denman, C. J.

(u) *R. v. Rosier*, 1 Phill. Ev. 411.

(v) *R. v. Edwards*, 1 Phill. Ev. 411.

(w) *R. v. Bate*, 11 Cox, 686.

(x) *R. v. Smith*, Worcester Spr. Ass. 1830, MSS. C. S. G. It is to be observed, that not only was there no express caution given in this case not to rely on the promise

made, but that by receiving the previous confession in evidence the magistrate treated it as if it had been properly obtained, and the prisoner might therefore well conceive that a subsequent confession could do him no injury, and might possibly be better for him; and see the ruling of the same learned judge in *R. v. Gilham*, *ante*, p. 493.

(y) *Tindal*, C. J., rejected this statement.



statement was incorporated into the constable's deposition. The prisoner was then told that anything he said would be taken down, and might be used against him, and the prisoner said that the statement to the constable was quite true. It was objected that the last statement would not make the statement to which it referred evidence. The recognition of an inadmissible statement could not make it admissible. Tindal, C. J., 'The impression made by the constable was afterwards removed by the caution given by the committing magistrate; and then the prisoner adopts his former statement. It is just the same as if the prisoner had repeated it or written it down *de novo* after the caution, and then its admissibility could not have been questioned.' (z) And where, before the above Act, the prosecutor, before the prisoner was taken before a magistrate, promised him that if he would tell the truth he would do what he could for him; and when before the magistrate, who was not informed of this promise, he was cautioned not to say anything to criminate himself, J. A. Parke, J., thought the confession made before the magistrate scarcely admissible, as there should have been an explicit and express warning against the promise which had been made by the prosecutor. (a)

Where a policeman said to the prisoner, who was charged with the murder of a bastard child, 'You had better tell all about it; it will save trouble;' and then put questions to her; Erle, J., held that her answers were inadmissible; but a superintendent of police having afterwards, about the same time, gone to the prisoner, and, without cautioning her, put certain questions to her; but it did not appear that he had referred her statements to the policeman; she had, however, said when she saw him, 'Ah, I expected you;' and the questions related to the number of her children, and especially what had become of the youngest, with whose murder she was charged, and whether she had been at Colchester on a particular day, Erle, J., after consulting Wightman, J., held that the answers were admissible. (b)

Where a person in superior authority holds out an inducement to a prisoner to confess, a confession made to a person in inferior authority is not admissible, especially if such person do not give the prisoner any caution. Upon an indictment for arson it appeared that the committing magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for him. The prisoner, after he was committed, made a statement to the turnkey of the gaol, who had held out no inducement to him to confess, and had

(z) *R. v. Horner*, 1 Cox, C. C. 364. No notice was taken of the statement having been incorporated in the deposition of the constable, and therefore treated by the magistrate as lawfully obtained; and *R. v. Smith*, *supra*, was not cited, though a decision directly in point the other way, and resting, be it said (with all deference to that very great judge, Tindal C. J.), on very sound reasons. C. S. G.

(a) *R. v. Compson*, Worcester Spr Ass. 1829, MSS. C. S. G. The learned judge left it to the jury to say whether the prisoner had sufficient warning before the jus-

tice or not. This course seems to have been erroneous. See *R. v. Nute*, *ante*, p. 495. See *R. v. Collier*, 3 Cox, C. C. 57; *R. v. Mellen*, 3 Cox, C. C. 507; *R. v. Doharty*, 13 Cox, C. C. 23.

(b) *R. v. Cheverton*, 2 F. & F. 833. The prisoner's statement was that the father of the child had written for it, and that she had sent it to him by a woman at the railway station at Colchester. The prisoner was acquitted, or the point would have been reserved; and the point deserves reconsideration.

not given him any caution not to confess. Parke, J., 'I think I ought not to receive the evidence, after what Mr. Simeon (the committing magistrate) said to the prisoner, more especially as the turnkey did not give any caution to the prisoner.' (c)

Where upon an indictment for murder it appeared that the prisoner had sent for the coroner, desiring to make some statement; the coroner told him that any confession that he made would be produced against him on the trial, and that no hope or promise of pardon could be held out to him, either by the government or by any one else. Previous to this time a magistrate had had an interview with the prisoner, and had told him that if he was not the man that struck the fatal blow he would use all his endeavours to prevent any ill consequences from falling on him, if he would disclose what he knew of the murders, and that there were so many persons concerned in the transaction that it would be made known by some or other of them. The magistrate wrote a letter to the Secretary of State for the Home Department, to which he received an answer, stating that mercy could not be extended to the prisoner, for reasons that were therein mentioned; which answer he communicated to the prisoner: all this occurred before the prisoner sent for the coroner. It was objected that, although the inducement that the magistrate would interest himself with the government had been removed, yet there were two other inducements: first, the hope that would arise from the personal endeavours of the magistrate; and, secondly, the fear that if the prisoner did not confess, some one else would tell before him. Littledale, J., 'I think that this declaration is clearly admissible. I think that the conversation with the magistrate, after he received the Secretary of State's letter, and the caution given by the coroner, must be taken to have completely put an end to all the hopes that had been held out.' (d)

Where a prosecutrix said to her servant-girl, who was in custody of a private person in her house at night, on a charge of administering poison, 'Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge, to the magistrates, and not return again;' on which the girl said, 'Sooner than I will go from here, or anywhere else, I will tell the truth;' to which the prosecutrix answered, 'That is all I want.' A statement then made was held inadmissible. On the following morning a constable came to the house, and while there, without giving her any caution, said to the girl, 'My dear girl, where did you get the stuff from that you put in the tea and coffee?' It was held that

(c) *R. v. Cooper*, 5 C. & P. 535. The Reporters observe, 'If a person of inferior authority cautions a prisoner not to confess, after an inducement held out by a person of superior authority, it is important to consider whether a statement made by a prisoner under such circumstances would be receivable; as it seems to be but a fair conclusion that what was said to the prisoner by the magistrate would be much more likely to operate on his mind than anything subsequently said by a constable.' It may be added, that as the inferior can have no con-

trol over the superior, it is difficult to see how any caution by the inferior could do away with the effect of the inducement by the superior, as the prisoner must be aware that the inferior could have no power to prevent the superior from carrying his promise into effect. See the ruling of Littledale, J., in *R. v. Gilham*, *ante*, p. 456. C. S. G.

(d) *R. v. Clewes*, 4 C. & P. 221. See *Bryan's case*, Joy, 73. *Jebb's C. & P. C.* 157.

what was then said must be considered as being under the influence of what was said the night before, because she was still in the house, and still in the hopes that she might not be taken before the magistrates. The constable afterwards took her to Stourbridge, and while on the way thither she made a statement, without any caution having been given, or any inducement having been held out to her, and this was held admissible, because the only hope was that she should not be taken away from the house, and this must have been at an end when she was taken away by the constable. (e)

(e) *As to Persons whose Inducements will exclude Confessions.*

With regard to the persons whose inducements will prevent the admission of confessions, it should seem that all who are engaged in the apprehension, prosecution, or examination of a prisoner are considered as persons of such authority that their inducements will exclude any confession thereby obtained. Thus an inducement held out by the prosecutor, (f) the prosecutor's wife, (g) or his attorney, (h) or by a constable or other officer, (i) or some person assisting a constable (j) or the prosecutor (k) in the apprehension or detention of the prisoner, or by a magistrate acting in the business, (l) or other magistrate, (m) or magistrate's clerk, (n) or by a gaoler (o) or chaplain of a gaol, (p) or by a person having authority over the prisoner, as by the captain of a vessel to one of his crew, (q) or by a master or mistress to a servant, (r) or by a person having authority in the matter, (s) or by a person in the presence of one in authority with his assent, whether direct or implied, (t) will be sufficient to exclude a confession made in consequence of such inducement.

The prisoner, when taken into custody, was told by a person who had accompanied the prosecutor in pursuit of the prisoner that it would be better for him to confess; but it was urged that, as he was a person who had no authority to interfere, the confession was admissible. *Littledale, J.*, 'That applies to mere strangers; here the person went with the prosecutor, and was acting with his authority and sanction.' The confession was rejected. (u)

Where a felony was committed on board a ship by the prisoner,

(e) *R. v. Jane Griffiths*, MSS. C. S. G. S. C. but not so fully reported *R. v. Richards*, 5 C. & P. 313, *Bosanquet, J.*

(f) *Thompson's case*, 1 *Leach*, 291. *Cass's case*, *ibid.*

(g) *R. v. Upchurch*, R. & M. 465, *post*, p. 505.

(h) 1 *Phill. Ev.* 407. *R. v. Croydon*, 2 Cox, C. C. 67, an attorney endeavouring to discover some burglars for the purpose of prosecution, *ante*, p. 482.

(i) *R. v. Sexton*, 1 *Burn. J., D. & Wms.* 1086.

(j) 1 *Phill. Ev.* 407.

(k) *R. v. Stacey*, MSS. C. S. G. *infra*, note (n).

(l) 1 *Phill. Ev.* 407.

(m) *R. v. Clewes*, 4 C. & P. 221, *ante*, p. 500.

(n) *R. v. Drew*, 8 C. & P. 140, *ante*, p. 483.

(o) *R. v. Gilham*, *ante*, p. 493.

(p) *R. v. Gilham*, *supra*.

(q) *R. v. Parratt*, 4 C. & P. 570.

(r) *R. v. Upchurch*, *supra*. *R. v. Taylor*, 8 C. & P. 733.

(s) 1 *Phill. Ev.* 407.

(t) *R. v. Taylor*, *supra*. *R. v. Pountney*, 7 C. & P. 302. *R. v. Garner*, 1 *Den. C. C.* 329.

(u) *R. v. Stacey*, *Monmouth Spr. Ass.* 1830, MSS. C. S. G.

one of the crew, towards another of the crew, and the master of the ship threatened to apprehend the prisoner, it was held that this threat excluded a confession; for the offence being a felony, and a felony having been actually committed, the master had power to apprehend the prisoner on reasonable suspicion that he was guilty. (*v*)

Where a constable, who had a prisoner in custody on a charge of murder, placed her in the custody of a woman whilst he went to the inquest, to prevent her going away, and the woman held out an inducement to her, it was held that a statement made in consequence was not admissible, as it was made after an inducement held out by a person who had her in custody. (*w*)

'It has been argued, that a confession made upon the promises or threats of a person erroneously believed by the prisoner to possess authority, the person assuming to act in the capacity of an officer or magistrate, ought upon the same principle (on which confessions to persons having authority are rejected) to be excluded. The principle itself would seem to include such a case; but the point is not known to have received any judicial consideration.' (*x*)

(*v*) Anonymous, as stated by Parke, B., in *R. v. Moore*, 2 Den. C. C. 522. This seems to be the same case as *R. v. Parratt*, *supra*, and *ante*, p. 493, except that the threat there was by the captain. The case as stated by Parke, B., fully supports my note (*x*) *infra*. C. S. G.

(*w*) *R. v. Enock*, 5 C. & P. 539, Parke, J., after consulting Taunton, J. This decision is clearly right, though the last ground of the decision in *R. v. Sleeman*, Dears. C. C. 249, is the other way. C. S. G. See *R. v. Windsor*, 4 F. & F. 360.

(*x*) Greenl. Ev. 258. As the question turns upon the effect produced upon the mind of the prisoner, and as that effect must be the same, whether the party be an officer or not, provided the prisoner believed him to be so, it should seem that a confession under such circumstances ought not to be admitted. See *R. v. Frewin*, 6 Cox, C. C. 530, *post*, p. 471. In considering these questions it should be remembered that every person has authority where a felony has been committed to arrest the party who committed it, *ante*, vol. i. p. 711 *et seq.*; in this respect, therefore, a private individual and a constable stand upon the same footing, and this may be well deserving of consideration in cases where the inducement is held out in the absence of the prosecutor or an officer. If a private person after a felony had been committed were to tell a person not in custody that he suspected him of the felony, and that if he would confess he would let him go, but that if he would not he would apprehend him, it might, it is conceived, be well contended that a confession obtained thereby would be inadmissible, on the ground that the party had authority to apprehend, and was in effect a constable *pro hac vice*. After the recent cases, an inducement by a private person, it should seem, can only be con-

sidered as inoperative when it is given in the presence of a person in authority, such person expressing his dissent to it, or cautioning the prisoner against trusting to it, or where it is given to a prisoner in custody, no one having authority being present, as if a private person were to advise a prisoner in gaol through the grating to confess, or send a letter to him to the same effect. 'The difficulty experienced in this matter,' observes Dr. Greenleaf, p. 259, 'seems to have arisen from the endeavour to define and settle, as a rule of law, the facts and circumstances, which shall be deemed in all cases to have influenced the mind of the prisoner in making the confession. In regard to persons in authority there is not much room to doubt. Public policy, also, requires the exclusion of confessions obtained by means of inducements held out by such persons. Yet even here the age, experience, intelligence, and constitution, both physical and mental, of prisoners are so various, and the power of performance so different in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of cases, it is wisely adopted, as a rule of law applicable to them all. Promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law that the confession must be voluntary being strictly adhered to, and the question whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left in the discretion of the judge under the circumstances of the case.' C. S. G.

If a confession be obtained by means of any improper inducement held out by a person who has no authority in the presence of a person having authority, and with his consent, it is not admissible. And it is not necessary that the person having such authority should express his consent in words; for if he be silent he will be presumed, as he did not express his dissent, to have sanctioned the inducement. (y)

Upon an indictment for housebreaking, it appeared that the prisoner resided with her husband, and that a constable went to their house, and charged her with breaking into the prosecutor's house, which she denied; but her husband coming in shortly afterwards, he told her if she knew anything about it to tell the truth; the constable, though present, made no observation, except that he must take her to the station-house, and desired her to go up stairs and put her things on; while she was up stairs she desired the constable to call her husband, and then made a statement as to certain articles of dress, which she produced, as having been purchased with the money which had been stolen. It was objected that what the prisoner said was inadmissible, as it was obtained by an inducement held out by her husband in the presence of the constable; and as the produce of the stolen property was found in the husband's house, he was *prima facie* liable to account for it, and that a statement made by the wife in the presence of and under the coercion of the husband, by which she accused herself and exculpated him, was clearly caused by undue influence on her mind. Pollock, C. B., 'The fact of the constable being present and not dissenting from what was said places the expressions used by the husband on the same footing as if they had been used by the constable; and I think that, as the constable was a person in authority, such an inducement ought to be sufficient to exclude the admission. Besides, I think there is a great deal of weight in what is urged as to the effect of the prisoner's statement being to exculpate her husband, and that I ought to be careful not to admit anything which may have been said in consequence of his coercion. (z)

So where two prisoners charged with murder were being conveyed in a cart, and the constable was in the cart with them, and could hear all that passed, and one prisoner said to the other, 'You had better speak the truth,' and the constable made no remark; Wightman, J., after consulting Parke, B., held that a statement then made was inadmissible, as the inducement appeared to have the sanction of the constable who was present, and apparently assented to it. (a)

So where the prisoner, a girl of fifteen, while in the custody of a policeman, said to her mistress, 'If you will forgive me I will tell you the truth,' to which the mistress replied, 'Ann, did you do it?' and the prisoner thereupon, in the presence of the constable, made a statement, Watkin Williams, J., held this to be inadmissible in evidence. (b)

So where on an indictment for committing an unnatural crime with a mare, the prisoner was found by the owner of the mare in a stable with the mare, and his trousers undone, and the mare bleeding

(y) *R. v. Pountney*, 7 C. & P. 302.(z) *R. v. Laughner*, 2 C. & K. 225.(a) *R. v. Millen*, 3 Cox, C. C. 507.(b) *R. v. Mansfield*, 14 Cox, C. C. 639.

and straining; and a man shortly afterwards, at a house whither the prisoner had gone, said to the prisoner, 'I wish to know what business you had in the stable?' he said, 'You know.' The man said, 'I don't know, and have come on purpose to know, and will know before I leave, and if you don't tell me I will give you in charge to the police till you do tell me.' The prisoner said again, 'You know.' The man said, 'I don't know, but, according to what I could see of the mare, it is the best of my belief that you had connection with her.' He said, 'I had; for God's sake, say nothing about it.' The owner of the mare was close by at the time this conversation took place. It was held, on a case reserved, that there was a threat used; and though at the time of the threat there was no statement of the charge, yet before the confession the prisoner was told, in the presence of the owner of the mare, that the charge was for having connection with the mare, which was just the same as if the threat had been made by the owner himself, and he, being the owner of the mare, was a person in such authority that a threat by him would exclude a subsequent confession. The confession, therefore, ought not to have been received. (c)

So where upon an indictment for setting fire to the house of R. Lyford, it appeared that on the morning of the fire the prisoner, who was the servant of the prosecutor, was sent for into the parlour in which Mrs. Lyford and Mr. Winders were; and that Mr. Winders, who was not a constable, or in any office or authority, said to the prisoner, 'You had better tell how you did it;' and that thereupon she made an answer. Patteson, J., said, 'It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in this case I should have received the evidence of the statement made to Mr. Winders if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. Lyford, who was the wife of the prosecutor and also the mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that therefore the evidence is inadmissible.' (d)

On an indictment for a misdemeanor in attempting to set fire to her master's house, it appeared that the prisoner, a girl aged thirteen, was a domestic servant to the prosecutor, whose wife lived with him, and took a share in the management of the house. After the attempt to set fire to the house was discovered, the prisoner's mistress, in the absence of the prosecutor, said to her, 'Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you.' She made no answer. The mistress then said, 'Pray tell me if you did it.' The prisoner then confessed. It was contended on the part of the prosecution that the wife had no authority, real or apparent, over the prisoner, so as to hold out any

(c) R. v. Luckhurst, Dears. C. C. 245.

(d) R. v. Taylor, 8 C. &amp; P. 733.

hope which could influence the prisoner to make a false statement, in order that her life might be spared, and therefore that the confession was admissible. The confession was admitted, and the question as to its admissibility reserved for the consideration of the judges, who thought the confession ought not to have been received. (e)

So where upon an indictment for stealing the goods of two partners, the wife of one of the partners said, 'I told the prisoner it would be better for him if he would tell how we had been robbed, and put us on our guard. I occasionally take the management of the shop. I manage the shop in my brother and husband's absence.' For the prosecution it was urged that an inducement by the prosecutor's wife rendered a confession inadmissible only when it was held out in the presence of her husband. An inducement by the wife of a constable would not vitiate a confession; Parke, B., 'The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority. I think this confession inadmissible.' (f)

But where upon the trial of a prisoner for murder there was offered in evidence against her a confession made by her in the presence of her mistress to a surgeon, who was attending her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found with the string round its neck. Her mistress had told her before the surgeon came in that 'she had better speak the truth,' and in answer she said she would tell it to the surgeon. An objection was taken that any subsequent confession was inadmissible. After consulting Coleridge, J., Parke, B., received the evidence, being of opinion that in this case her husband not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth. And upon a case reserved, after argument for the prisoner, Parke, B., delivered judgment: 'A rule has been laid down that if the threat or inducement is held out actually or constructively by a person in authority, the confession cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. But in referring to the cases where the master or mistress has been held to be a person in authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In the present case the offence of the prisoner, in killing her child and concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In

(e) *R. v. Upchurch*, R. & M. C. C. R., 465. See *R. v. Garner*, 1 Den. C. C. 329, *post*, p. 537. (f) *R. v. Warringham*, 2 Den. C. C. R. 447, *nota*.

practice the prosecution is always the result of the coroner's inquest. Therefore we are clearly of opinion that the confession was properly received.' (g)

The preceding cases clearly establish the position that, if a threat or inducement be held out in the presence of a person in authority, and he does not dissent therefrom, the effect is precisely the same as if it had been held out by the person in authority. (h)

On a trial for setting fire to a house, it appeared that the prisoner, a girl about fifteen years old, was a servant in the prosecutor's house, and that soon after the fire was put out Handsley, a neighbour of the prosecutor's, said to the prisoner, 'I doubt you have set this house on fire by the candle between the laths.' She said she did not. On the same day Mrs. Bowis, who lived about three hundred yards from the house of the prosecutor, and who was the mother of Mrs. Blackburn, the wife of the prosecutor, spoke to the prisoner in the prosecutor's house in the presence of Mrs. Blackburn, who was very deaf, and the prisoner's mother, and told her she had better confess the truth, because she believed it was her that fired both the house and the stack, and that it would be a great deal the worse for her if she did not confess. The prisoner said she did not. On the same day the prisoner was taken before a magistrate at Spilsby. On the next morning, Mrs. Bowis saw the prisoner again on the road to her house. Mrs. Bowis said to the prisoner, she should not come to her house, and told her again it was her that fired both the house and stack; she said she did not do it. Soon after Handsley came up and joined them, and said to the prisoner, 'Don't be so bold; perhaps you will have to go to Spilsby to-morrow.' Spilsby was the place where the magistrates met. He told her that perhaps somebody will come forward to-morrow that saw you do it. She took her apron up and held it to her face, and said no more. She always denied it; and when Handsley said she might have to go to Spilsby she denied it again. He said, 'If you be guilty, go along with Mrs. Bowis, and beg your master's and mistress's pardon, and get away, and be better in future, and we shall not seek after you;' and he said, 'Never mind your wages: I'll give you a few shillings out of my pocket.' And Handsley also told her it would be better for her to confess. After he went away, Mrs. Bowis went with the prisoner to Blackburn's house, and talked to her about the fire all the way; and after they got there, they went out of the house, and Mrs. Bowis said to the prisoner, 'Now, Sarah, you lighted the bunch of matches, and put it into the thatch of the house;' before she said that, she told the prisoner that if she went to Spilsby again she would be a great deal worse off, and she said to her several times, both going along the road to the prosecutor's house, and also in the house, and also when she spoke to her out of doors, that it would be a great deal better for her if she would confess, and a great deal worse for her if she did not confess. The counsel for the pris-

(g) *R. v. Moore*, 2 Den. C. C. 522, 3 C. & K. 153.

(h) *R. v. Parker*, L. & C. 42, at first sight may appear the other way; but in all prob-

ability this decision proceeded on the ground that desiring a prisoner to tell the truth is not an inducement.



oner objected to evidence being given of what the prisoner said, on Mrs. Bowis charging her as before stated, on the ground that after these promises and threats had been held out to her, her answer could not be received unless she had a caution. For the prosecution it was contended that her answer might be received, because Handsley was neither a constable, nor did he stand in any relation to the prosecutor; and though Mrs. Bowis was the mother of the prosecutor's wife, yet that promises and threats made by a person standing in that situation were not sufficient to exclude a confession. Little-dale, J., allowed the evidence to be given, but reserved the question for the opinion of the judges, whether it ought to have been received. On Mrs. Bowis saying to the prisoner, 'Now, Sarah, you lighted the bundle of matches, and put it into the thatch?' the prisoner said, 'Yes, I did.' Mrs. Bowis then told Mrs. Blackburn what had passed, and Mrs. Blackburn then came out, and then Mrs. Bowis, in the presence of Mrs. Blackburn, asked the prisoner what she did it for; whether it was for anything against the family? She said, 'No.' Mrs. Blackburn asked if any one persuaded her to it? She said 'No;' she said she had no malice. The prisoner in her defence asserted her innocence, and said that Mrs. Bowis said that if she would confess to it she should have her liberty, and she added that she did it on purpose to get her liberty, and that they frightened her to do it. The jury said they found the prisoner guilty by her own confession; but Little-dale, J., told them they must find her either guilty or not guilty, and then they gave a verdict of guilty; and all the judges, upon a case reserved, were unanimously of opinion that the confession ought not to have been received, and that the conviction was bad. (i)

With regard to the persons whose inducements will not exclude

(i) *R. v. Simpson*, R. & M. C. C. R. 410. The grounds upon which this decision proceeded are not mentioned in the report, and the real import of the case does not appear to be correctly abstracted in the text books, as observes Mr. Joy, p. 9; and after abstracting the case he well observes, 'that it was in the prosecutor's house, and in the presence of the prisoner's mother, and of the prisoner's mistress, a person in authority over her, and under her implied sanction, that the prisoner was told in the first instance that it would be better for her to confess. So in the conversation that immediately elicited the confession, the inducement was held out in the prosecutor's house, [this is an error, it was after "they went out of the house,"] and although it does not appear distinctly whether the prosecutor or his wife were then present, [it is clearly to be inferred that they were not present, for after the prisoner said "I did," Mrs. Bowis told Mrs. Blackburn, and she "then came out,"] the influence caused by the inducement held out on the preceding morning, in the presence of the prosecutor's wife, and in his house, may perhaps be considered to have continued,' Joy, 10 and 11, and he refers to *R. v. Upchurch*, ante, p. 501, and *R. v. Taylor*, ante, p. 501, to shew that the mistress is a

person in authority. It may be observed, also, that *Patteson, J.*, held in *R. v. Taylor*, that an inducement held out by a person in the presence of the prisoner's mistress must be taken as if it had been held out by the mistress herself: from which it may be inferred that that very learned judge considered the person holding out the inducement as the agent for that purpose of the mistress. In that case, as the prosecutrix expressed no dissent, she was taken to have sanctioned the inducement; so in the present case the same must be inferred as to the inducement first held out in the presence of the mistress; and as by her conduct in the latter part of the transaction the prosecutrix sanctioned what Mrs. Bowis had done in her absence, the learned judges may have thought that Mrs. Bowis was the agent of the prosecutrix for the purpose of discovering the guilt of the prisoner. If a person were expressly employed by the prosecutor to discover the person who had committed a felony, there seems good reason why he should be considered as a person having so much to do with the apprehension and prosecution as to render a confession obtained by his inducements inadmissible. See *R. v. Stacey*, ante, p. 501. C. S. G.

a confession : the result of these cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner ; (j) for a promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent.

The wife of the constable is not a person in authority. (k)

In a case of murder a surgeon stated that he had held out no threat or promise to induce the prisoner to confess ; but a woman who was present said that she had told the prisoner she had better tell all ; and then the prisoner made certain confessions to the surgeon. It was objected that, as the confession was made after an inducement held out, it could not be received in evidence ; but J. A. Park, J., after consulting Hullock, B., held that, as no inducement had been held out by the surgeon to whom the confession was made, and the only inducement had been held out by a person having no authority, it must be presumed that the confession to the surgeon was a free and voluntary one. If the promise had been held out by a person having any office or authority, as the prosecutor, constable, &c., the case would be different ; but here, some person having no authority of any sort officiously says, ' You had better confess.' No confession follows, but some time afterwards, to another person, the prisoner, without any inducement held out, confesses. The learned judge added, that he and Hullock, B., had not the least doubt that the evidence was admissible. (l)

The prisoner was indicted for placing a piece of iron on a railway, and a platelayer in the service of the company, but who was not employed by any of his superiors to see the prisoner, had told him that it would be a good deal better for him if he owned to it. The prisoner knew that the platelayer worked on the line. Cresswell, J., ' I am disposed to think the statement of the prisoner is receivable, the witness not being a person having any authority to make any promise ; still he was in a position that might reasonably lead the prisoner to believe he had ; ' and thereupon the counsel for the prosecution declined to ask as to the statement of the prisoner. (m)

There has been a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable : some of the judges thinking it receivable, and others thinking it is not so. (n) And several cases have occurred, in which confessions made to persons without authority, in consequence of inducements held out by such persons, have been rejected. (o) But it is said to be the opinion of

(j) *R. v. Row*, R. & R. 153. *R. v. Tyler*, 1 C. & P. 129.

(k) *R. v. Hardwick*, 1 Phill. Ev. 408.

(l) *R. v. Gibbons*, 1 C. & P. 97.

(m) *R. v. Frewin*, 6 Cox, C. C. 530. The prisoner was not defended. The marginal note treats this as an actual decision.

(n) Per Parke, B., in *R. v. Spencer*, 7 C. & P. 776.

(o) In *R. v. Dunn*, 4 C. & P. 543, a witness proved that the prisoner wished to sell a stolen book to him, and that he told him he had better tell where he got it. Bosanquet, J., ' Any person telling a prisoner that it will be better for him to confess will always exclude any confession made to that person. Whether a prisoner's having been told by one person, that it will be better for

the judges that 'evidence of any confession is receivable, unless there has been some inducement held out by some person in authority.' (p)

(c) *Confessions elicited by Questions.*

As to the committing magistrate putting questions to the accused, see *post*, p. 541.

In a case where Miller, the chief officer of the police at Liverpool, stated, that on the 18th of November the prisoner, a boy of fourteen years of age, was apprehended by his directions, without any warrant, between twelve and one o'clock, and that he was carried to the police office about one o'clock. The magistrates were then sitting at a very short distance, and continued sitting till between two and three, and till the business presented to them was finished; but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell on his own authority, between four and five o'clock; and between five and six o'clock he told the prisoner that, in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt but he had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The police officer replied that he would not have told so many falsehoods as he had if he had not been concerned in it, and he again asked him if anybody had induced him to do it? The prisoner then began to cry, and made a full confession. In speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made. The prisoner was taken before he had dined, and had had no food from the time he was apprehended till after his confession. Bayley, J., thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal, and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the

him to confess, will exclude a confession subsequently made to another person, is very often a nice question; but it will always exclude a statement made to the same person.' In *R. v. Slaughter*, *ibid.* note (a), the same learned judge rejected a confession made by the prisoner to one of his fellow-workmen, who had told him it would be better for him to confess. In *R. v. Arundel*, Gloucester Summer Assizes, 1830, the same learned judge ruled the same way, saying, 'if an unauthorised person makes a promise, it will not prevent a statement made to another person from being received in evidence; but if the statement be made to the person who makes the promise, I think it ought not to be received.' The same distinction is also adverted to in a note to *R. v. Gibbons*, *supra*. For this distinction, however, there seems no sufficient reason. The correct inquiry in every case is, whether the

inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. If it was, then a statement made under its influence, whether to the party using the inducement, or to another person, would be inadmissible. At the same time, it must ever be a circumstance deserving of consideration, in conjunction with others, that the prisoner did not make the confession to the party using the inducement at the time, but made it afterwards to another party; as that tends to shew that he was not under the influence of the inducement when he confessed; and this is the view which the court seems to have adopted in *R. v. Gibbons*. See also Mr. Joy's observations, pp. 26, 27. C. S. G.

(p) Per Patteson, J., in *R. v. Taylor*, 8 C. & P. 734. See *R. v. Moore*, 2 Den. C. C. 526, per Parke, B.

judges, a majority of whom held the confession rightly received, on the ground that no threat or promise had been used. (*q*)

Where rumours had been afloat that the prisoner had been delivered of a child, but the only ground for such suspicion was that she had been observed up to a certain time to increase in size, and had afterwards recovered her usual form; and in consequence of these rumours a police officer went to her, charged her with having been recently delivered, and with having murdered the child, or at least concealed its birth. The result of his questioning was that she made a statement, which he detailed. Erle, J., made strong observations on the impropriety of questioning the prisoner at the time when there was no proof of any crime having been committed, but the evidence was left to the jury. (*r*)

In one case in Ireland where a constable arrested a prisoner, and having given the usual and proper caution (*s*) proceeded to search his house, and having found the prisoner's coat, which was wet from washing, asked him why he had washed his coat? The Chief Baron ruled that the answer could not be given in evidence, and said that where a constable arrests a party he ought to abstain from asking questions; he ought to leave that duty to the magistrate, who alone has the power to reduce to writing what is said by the prisoner. (*t*)

A confession obtained by questions put by the prosecutor's wife, (*u*) or by persons who are neither constables or officers, (*v*) or by a fellow prisoner, (*w*) is admissible. So where it was proposed on the part of the prosecution to prove what had been said by the defendant in his examination before a committee of the House of Commons, which the defendant had been compelled to attend; and on the part of the defendant it was objected that, since this statement had been made under a compulsory process from the House of Commons, and under the pain of incurring punishment as for a contempt of the House, the declarations were not voluntary, and could not be admitted for the purpose of criminating the defendant; Abbott, J., overruled the objection and admitted the evidence. (*x*)

(*q*) *R. v. Thornton*, P. & M. C. C. R. 27, Best, C. J., Bailey, J., and Holroyd, J., *dis-sentientibus*. *R. v. Kerr*, 8 C. & P. 176. *Gibney's case*, Joy, 36. *R. v. Hughes*, *ibid*. 39. Although there can be no doubt that confessions elicited by questions put by officers are admissible, still there can be equally little doubt that it is no part of the duty, or rather that it is a breach of the duty, of an officer to put questions to prisoners in their custody, and learned judges have in many cases reprobated such conduct in the strongest terms; and in a recent case, where it appeared that a constable was in the practice of interrogating prisoners in his custody, Patten, J., threatened to cause him to be dismissed from his office. *Hill's case*, Rosc. Cr. Ev. 45. *R. v. Hassett*, 8 Cox, C. C. 511. (*r*) *R. v. Berriman*, 6 Cox, C. C. 388. It should, however, be borne in mind in these cases, that every peace officer is justified in apprehending on reasonable suspicion, though no felony has been committed; and that in cases of suspicion it may frequently

be perfectly right for a peace officer to ask questions of a suspected person not in custody, provided such questions be fair and adapted to the particular circumstances.

(*s*) It is not stated what it was.

(*t*) *R. v. Bodkin*, 9 Cox, C. C. 403. And A. L. Smith, J., has ruled that where a prisoner is in custody the police have no right to ask him any questions, and that any admission or confession in answer to such questions is inadmissible. *R. v. Gavin*, 15 Cox, C. C. 656. This case has been followed by other judges, but has been disapproved by Day, J. *R. v. Brackenbury*, 17 Cox, 628.

(*u*) *R. v. Upchurch*, *ante*, p. 501.

(*v*) *R. v. Wild*, *ante*, p. 481.

(*w*) *R. v. Shaw*, 6 C. & P. 372.

(*x*) *R. v. Mercer*, 2 Stark. N. P. C. 366. 'I think there must be some mistake in that case; the evidence must have been given without oath; and before a committee of inquiry, where the witness would not be bound to answer.' Per Lord Tenterden, C.

*(f) When Prisoner's Examination on Oath Evidence.<sup>1</sup>*

If the written examination of a prisoner taken before the committing magistrate purport to have been taken on oath, it is not admissible. An examination of a prisoner taken before a magistrate was written under the following words, which except as to the name were printed, 'The examination of — Hornage, taken on oath before me,' &c., and was signed by the magistrate; and Le Blanc, J., rejected the examination, because it purported to have been taken on oath, and would not permit a witness to be examined for the purpose of showing that no oath had in fact been administered to the prisoner, saying that he could not allow that which had been sent in under the hand of the magistrate to be disputed. (*y*)

So an examination beginning, 'This deponent saith,' has been rejected, as that implied that the statement was made upon oath. (*z*)

The ground on which these decisions proceeded was, that the account given by a prisoner before a magistrate ought not to be upon oath; and if the prisoner has been sworn, his statement cannot be received. (*a*)

But although it is quite correct to hold that an examination of a prisoner in writing purporting to be taken on oath is inadmissible, because such an examination is apparently taken in direct violation of the statute, yet it seems clearly erroneous to hold that, when in point of fact the examination has been regularly taken in accordance with the statute, no evidence of it should be admissible, because by accident or negligence it has been stated to be upon oath. Where in direct violation of the statute no examination in writing has been taken, evidence is admissible of what the prisoner said, (*b*) and *a fortiori* such evidence ought to be admitted where the statute has been substantially complied with, but an accidental error, in no way tending to the prejudice of the prisoner, has occurred. It is submitted, therefore, that where the examination on the face of it erroneously states the prisoner to have been examined on oath, it should be permitted to the prosecutor to prove that that was not the

J., in *R. v. Gilham*, R. & M. 203, on *R. v. Mercer* being cited. See also in *R. v. Garbett*, 2 C. & K. 483, further remarks on this case. So if a witness answers questions to which he might have demurred, as subjecting him to penalties, his answers may be used against him for all legal purposes; and therefore, in an action on 5 Geo. 2, c. 30, s. 21, the defendant's examination before the commissioners was allowed to be given in evidence, to show that by his own confession he had concealed the property of the bankrupt. *Smith v. Beadnell*, 1 Campb. 30. See also *Stockfleth v. De Tastet*, 4 Campb. 10.

(*y*) *R. v. Smith*, 1 Stark. R. 242. See *R. v. Pikesley*, 9 C. & P. 124, Parke, B. But it seems, although there are cases to the contrary, that parol evidence might be given to show what the prisoner's statement was. *R. v. Wheeley*, 8 C. & P. 250; *R. v. Owen*, 9 C. & P. 83; *R. v. Rivers*, 7 C. & P. 177; *R. v. Bentley*, 6 C. & P. 148, and MSS. C. S. G., *post*, sec. 2 of this chapter.

(*z*) *R. v. Shellswell*, Oxford Spr. Ass. 1828, J. A. Park, J., MSS. C. S. G.

(*a*) *R. v. Smith*, 1 Stark. N. P. C. 242. As to examinations by magistrates generally, see *post*, p. 538.

(*b*) See the cases, *post*, p. 523.

## AMERICAN NOTE.

<sup>1</sup> See *P. v. Mahon*, 15 N. Y. 384. Shaffler 400. *S. v. Gilman*, 51 Maine, 206. *S. v. S.*, 3 Wisc. 823. *S. v. Marshall*, 36 Mo. Matthias, 66 N. C. 106.

fact, and on such proof to give evidence of what the prisoner said before the magistrate.

Upon an indictment for administering poison, it appeared that on the day on which the prisoner was committed she and several others were summoned before a magistrate, and at a time when she was under no charge, and when there was no specific charge against any person, she and the other persons were examined upon oath touching this poisoning, and their statements taken down in writing; but on the conclusion of the examination, the prisoner was committed for trial on this charge. It was proposed to put in the examination of the prisoner, and *R. v. Tubby (c)* was cited. Gurney, B., 'This case is quite distinguishable from the case cited. Under the circumstances of that case I should have been disposed to agree with my brother Vaughan. I remember in the case of *R. v. Walker*, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors Commons, and the prisoner was convicted and executed. But this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, I think it is not receivable. I do not think this examination was perfectly voluntary.' (d)

Upon an indictment against a father and daughter for receiving stolen goods, it appeared that the daughter had been examined upon oath as a witness before the committing magistrate, and it was proposed to ask what she then said in the presence of her father. Gurney, B., 'I think you cannot do that. We cannot hear anything she said before the magistrate when she was a witness; if after having been a witness you make her a prisoner, nothing of what was said then can be admitted in evidence.' (e)

The prisoner being in Bridewell sent for a magistrate, and asked what was the charge against him, which the magistrate told him. Nothing further passed. About an hour afterwards the prisoner again sent for the magistrate, and made an information, which was produced. The magistrate made no threat, and held out no inducement to the prisoner, and did not caution him against criminating himself. He was sworn, and put his mark to it. The magistrate

(c) 5 C. & P. 530, *post*, p. 515.

(d) *R. v. Lewis*, 6 C. & P. 161, and MSS. C. S. G. Mr. Phillpotts, vol. i. p. 403, observes, 'When she was summoned to appear, suspicion attached to her; and the case bears a strong resemblance to that of an individual examined on oath under a charge.' This is inaccurate, and neither warranted by the report in C. & P. nor my note of the case, and I was counsel in it. The prisoner was summoned in the ordinary way as a person who could give some evidence touching the matter, and not because any suspicion attached to her. See the note (e) *infra*. C. S. G.

(e) *R. v. Davis*, 6 C. & P. 177, and MSS. C. S. G. Mr. Phillpotts, vol. i. p. 404, observes, 'It does not appear from the report that this individual was taken as a prisoner before the magistrate; but there were circumstances sufficient to raise a

suspicion of guilt, and sufficient also to shew that the statement was not perfectly voluntary.' It should seem, from the fact of her being examined as a witness, that she was not taken before the magistrates as a prisoner; and as to the circumstances sufficient to raise a suspicion of guilt, none such are stated to have been proved before the magistrate, either before or at the time when her examination was taken; and assuming that such suspicion might exist in the minds of the magistrates or others, or even that the prisoner might be aware that there was such suspicion, that was not the ground of the decision, but that the prisoner had been examined on oath as a witness; and after the decision in *R. v. Wheeler*, *post*, p. 516, it may perhaps be doubted whether this was a sufficient reason for rejecting the deposition. C. S. G.

did not inform the prisoner that his information would be used against him. The magistrate thought the prisoner would be admitted as a Crown witness, and the prisoner might have been under that impression also. The prisoner 'was in as a Crown witness.' The prisoner swore his information again, but not in the presence of the other prisoners, but he refused to support his information, or appear as a witness. The magistrate had refused to admit the prisoner to bail. It was objected that the information was inadmissible as a confession, because the usual caution was not given, and an inducement was used; and, further, that its being on oath rendered it inadmissible; and upon a case reserved, it was held that the information ought not to have been received in evidence. (*f*)

With reference to an examination of a person charged as a prisoner taken upon oath, Mr. Phillipps observes, 'As an examination, it is irregular: the modern statute, which regulates the proceedings of magistrates on criminal charges brought before them, makes a distinction between the examination of a prisoner and the informations of those who make the charge; the informations, but not the examinations of the prisoner, being especially required to be on oath. Since the statement upon oath cannot be received as a judicial proceeding or formal examination, is it admissible as a confession? There are objections to it also in that form; the oath imposed on the prisoner, especially whilst in custody, is likely to operate as a constraint, or as a kind of compulsion; the statement therefore cannot be considered as completely free and voluntary. (*g*)

If a prisoner is sworn and examined by a magistrate by mistake, and his deposition is destroyed, and an examination then taken in the regular way, it is admissible. On an indictment for arson

(*f*) *R. v. M'Hugh*, 7 Cox, C. C. 483. See *R. v. Gillis*, 11 Cox, C. C. 69.

(*g*) 1 Phill. Ev. 402. Assuming that an oath may be likely to operate as a constraint, there seems no reason whatever why, where a prisoner's examination has been taken upon oath, that fact should operate further than to raise a *prima facie* presumption that the statement was not voluntary, and to throw the onus of shewing that it was spontaneous upon the prosecutor. Suppose, after the statement of a prisoner had been regularly taken without an oath, he were himself to volunteer to swear to the truth of it, and the magistrate were incautiously to permit him so to do, it would be difficult to assign any good reason why such a statement should not be admissible. In *R. v. Wheeler*, *post*, p. 516, Lord Abinger, C. B., said, in the presence of all the judges, 'I understand, if a prisoner's examination be on oath, it shall not be received in evidence without reference to a duress or threat; I see no reason for it; in principle the answer may be quite voluntary.' It should be remembered that a magistrate has no authority to administer such an oath, and therefore the prisoner has a right to refuse to take it. In *R. v. Wheeler*, on *R. v. Tubby*, *post*, p. 515, being cited, Alderson, B., observed, 'It does not appear there that

the oath was a lawful one:' from which, perhaps, it may be inferred that the very learned Baron considered that a distinction might be drawn between a lawful and an unlawful oath; and it is apprehended that such a distinction might well be drawn, as in the one case the justice has the power to enforce by commitment an answer to any legal questions; in the other he has no such power. And see *R. v. Shaw*, 6 C. & P. 372. The first mention of the mode of taking prisoners' examinations is in Kelyng, p. 2, where the judges' orders direct, 'that all justices of the peace do take examinations of the felons without oath.' The same is stated in B. N. P. 242. The first case where an examination was rejected on the ground that it purported to be on oath is *R. v. Smith*, 1 Stark. R. 242, *ante*, p. 511. There is no doubt that an examination of a prisoner taken on oath is irregular, and therefore inadmissible as an examination under the statute, and, perhaps, the rejecting the examination of prisoners on oath altogether may have originated in not distinguishing between an examination admissible under the statute, and admissible as evidence at common law. The point seems to have been taken for granted in all the cases, and never solemnly discussed. C. S. G.

against two prisoners, it appeared that, when one of the prisoners was first brought before the magistrate, it was thought that he had appeared as a witness, and by mistake he was sworn; but it being discovered that he was one of the accused persons, the deposition, which had been commenced, was torn, and the prisoner subsequently made a statement, after having been cautioned by the magistrate; and that statement was offered in evidence. It was objected that the whole examination before the magistrate was but one transaction, and that the oath was binding during the whole inquiry. Garrow, B., 'What was first taken down and afterwards destroyed does not prejudice the prisoner. We do not know what he said: it is as if it never existed:' and the statement was received. (h)

The principle of these decisions does not apply to a statement made by a prisoner, in an examination before a magistrate, when he was not in custody, but examined against another person on a distinct charge; provided, of course, there has been no inducement given to confess, and no promise of favour or of a reward for information; a statement so made by one in his capacity of witness, who was perfectly free to refuse answering any questions that had a tendency to expose him to a criminal charge, seems to be clearly admissible. (i) And it may be laid down generally that a statement upon oath by a person not being a prisoner, and when no suspicion attached to him, the statement not being compulsory, nor made in consequence of any promise of favour, is admissible in evidence against him on a criminal charge. (j) Thus where, upon an indictment for forgery, it appeared that, before the prisoner was either charged with or suspected of having committed any offence, one Shearer had been examined on a charge of forgery, and that the prisoner was called as a witness against Shearer on that occasion, and sworn to a deposition, which was proposed to be read against the prisoner; and it was objected that the deposition, being a statement made upon oath, could not be received as evidence against the prisoner; Parke, J., said, 'I think I ought to receive this evidence. The prisoner was not, at the time when he made this deposition, charged with any offence: and he might on that, as well as on any other occasion, when called as a witness, have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so, his deposition is evidence against him.' (k) So where on an indictment for burglary it was

(h) *R. v. Webb*, 4 C. & P. 564.

(i) 1 Phill. Ev. 404. In *R. v. Coote*, 42 L. J. Priv. C. Ca. 45, Sir R. P. Collier, whilst delivering the judgment of their lordships, and after referring to many cases on the subject, said, 'From these cases, to which others might be added, it results, in their lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *nemo tenetur seipsum accusare*, but does not apply

to answers given without objection, which are to be deemed voluntary.' In another part of the judgment Sir R. P. Collier said, 'With respect to the objection that Coote, when a witness, should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned, it is enough to say that the caution is, by the terms of the statute, applicable to accused persons only, and has no application whatever to witnesses.'

(j) *Ibid.* See *R. v. Colmer*, 9 Cox, C. C. 506; *R. v. Bateman*, 4 F. & F. 1068.

(k) *R. v. Haworth*, 4 C. & P. 254. Greenw. Stat. 138 n.



proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion, and it was objected that it was a violation of the rule of law that a prisoner should not be sworn, Vaughan, B., said, 'I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it a statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it.' (l)

So where, on an indictment for threatening to accuse of an infamous crime, it appeared that the prisoners had made a charge against the prosecutor, and been examined before the magistrate as witnesses against the prosecutor, and their depositions contained both their examinations and cross-examinations; their answers on cross-examination were not only contradictory in themselves, but quite inconsistent with each other. It was held that the examinations were admissible, but that the cross-examinations were not, as there was not any such connection between these answers and the particular charge in this indictment as to make them relevant. (m) So where Chidley and Cummins were indicted for maliciously wounding, and at the examination before the magistrates, Chidley alone was charged with committing the offence, and Cummins came forward voluntarily, and gave evidence exculpating Chidley, and confessed that he had inflicted the injuries upon the prosecutor, and upon this he and Chidley were committed; it was held that Cummins's deposition was admissible. (n)

On an indictment for forging the acceptance of a bill of exchange, 'Accepted, payable at Masterman and Co.'s, London, William Booth,' it appeared that the prisoner had been called as a witness for Booth in an action brought against him on that bill, and in cross-examination he made several statements tending to shew that the acceptance was a forgery without objection, and afterwards either put himself in the hands of the Court or declined to answer questions put to him, but he was compelled to answer these questions, and this examination of the prisoner was proposed to be given in evidence on the trial for forgery; the counsel for the prisoner objected to those parts of the cross-examination being read which followed the prisoner's declining to answer, and applying to the Court for protection. The objection was overruled, and, on a case reserved, it was held that if a witness claims the protection of the Court, on the ground that the answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and, if obliged to answer notwithstanding,

(l) *R. v. Tubby*, 5 C. & P. 530. The deposition was not read, but withdrawn by the counsel for the Crown, as it did not contain anything material. In *R. v. Wheeler*, *infra*, Vaughan, J., said, 'In *R. v. Tubby*, what reason is there for saying that there was any restraint on the person making the statement?'

(m) *R. v. Braynell*, 4 Cox, C. C. 402, Williams, J. The particulars of the cross-examinations are not stated. See my note on this decision, Appendix B. To which it may be added that the examination and cross-examination formed one document

and, according to the general rule, the whole ought to have been read. See *Goss v. Quinton*, 3 M. & Gr. 825, where an examination of a bankrupt contained his examination in chief and cross-examination, and in the latter a copy of an agreement was incorporated, and it was held that the examination was one entire thing, and that the whole must be put in evidence, including the cross-examination and copy of the agreement. C. S. G.

(n) *R. v. Chidley*, 8 Cox, C. C. 365. Cockburn, C. J.

what he says must be considered to have been obtained by compulsion, and cannot be given in evidence against him; and that it made no difference in the right of the witness to protection that he had chosen to answer in part, as he was entitled to it at whatever stage of the inquiry he chose to claim it, and that no answer forced from him by the presiding judge, after such claim, could be given in evidence against him. (o)

The prisoner was indicted for mutilating one of his trade books, and his examination before the Court of Bankruptcy was given in evidence against him. In this examination questions were put, and answers obtained to them under the threat of committal; these questions and answers related to the prisoner's trade books. Upon a case reserved it was held that, as all the questions touched matters relating to his trade dealings or estate, the bankrupt was bound to answer them, although by his answers he might criminate himself. That the questions, though tending to criminate the bankrupt, are made lawful, and if he refuses to answer them he is liable to be committed as upon a refusal to answer any other lawful question. That the statute has taken away the privilege that a party is not bound to accuse himself, and has enacted that he must answer questions by answering which he may be criminated; and that one of the consequences is that what may be stated by a person in a lawful examination may be received in evidence against him. The examination, therefore, was properly received. (p)

Where the bankrupt's examination in the Court of Bankruptcy was not respecting any matters relating to the trade dealings or estate of the bankrupt, the Court held that the examination was properly received. Upon the trial of an indictment against the bankrupt for uttering a forged letter with intent to obtain goods, the proper test is whether the party *may* object to answer. If he may, and he does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible against him. This examination was not touching any matters relating to the trade dealings or estate of the bankrupt; he might have objected to the examination, but he did not do so; the examination therefore was voluntary and admissible. (q)

(o) *R. v. Garbett*, 1 Den. C. C. 236, 2 C. & K. 474. This was the ruling of nine judges, Parke, B., Alderson, B., Coltman, J., Maule, J., Rolfe, B., Wightman, J., Cresswell, J., Platt, B., and Williams, J., against Lord Denman, C. J., Wilde, C. J., Pollock, C. B., Patteson, J., Coleridge, J., and Erle, J. The nine judges did not decide as the case did not call for it, whether the mere declaration of the witness on oath, that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering, where other circumstances did not appear in the case to induce the judge to believe that it would not. The nine judges did not think *Dixon v. Vale*, 1 C. & P. 278, and *East v. Chapman*, 2 C. & P. 573, binding authorities. See *post*.

(p) *R. v. Scott*, D. & B. 47; 25 L. J. M. C. 128. Coleridge, J., dissented. *R. v.*

*Cross*, Dears. C. C. 68, S. P. R. v. Widdop, 42 L. J. M. C. 9; L. R. 2 C. C. R. 3. *R. v. Robinson*, 36 L. J. M. C. 79; L. R. 1 C. C. R. 80. *R. v. Hillam*, 12 Cox, C. C. 174. See *R. v. Wheat*, 2 M. C. C. R. 45, 2 Lew. 157. *R. v. Britton*, 1 M. & Rob. 297. *R. v. Cherry*, 12 Cox, C. C. 32.

(q) *R. v. Sloggett*, Dears. C. C. 656; 25 L. J. M. C. 93. In *R. v. Darby*, 2 Cox, C. C. 316, a bankrupt had been examined before a commissioner, not so much with a view to oppose his certificate as to this prosecution, which was for false pretences, and he had not been cautioned; but his solicitor was present; and the Recorder held that, as he had been examined for the purpose of this prosecution, and not with reference to the bankrupt laws, his examination was inadmissible. But this decision can hardly be considered as an authority after *R. v. Sloggett*, and *R. v.*

By sec. 17 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which regulates the public examination of debtors, (7) 'The Court may put such questions to the debtor as it may think expedient.' (8) 'The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.' (r)

By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), sec. 27, so much of 24 & 25 Vict. c. 96, s. 85, is repealed as provided that no person should be liable to be convicted of misdemeanors created by secs. 75-84 of that Act (being frauds by agents, bankers, or factors), if he should have first disclosed the same in any compulsory examination in bankruptcy, and it is enacted that 'A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy, shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in the said sec. 85.' (rr)

Upon an indictment for forging a deed, the answer and deposition in chancery of the prisoner were tendered in evidence against the prisoner, and were objected to on the ground that they were upon oath; but Vaughan, B., was clearly of opinion that they were admissible, being made before any charge was made against the prisoner. The amended bill in the same suit in chancery was put in and read; it contained a charge of forging the deed against the prisoner, on which it was again objected that the answer and deposition of the prisoner were not admissible, upon the ground that the bill contained such charge of forgery. Vaughan, B., 'The argument would go the length of not admitting depositions in the case of perjury. If the party chooses voluntarily to answer, he is bound by it, and the answers are admissible.' (s) So on an indictment for a conspiracy, the answers in chancery of the defendants, which had been made by them upon oath, in a suit which had been instituted by the prosecutor, are admissible in evidence. (t)

By the Explosive Substances Act, 1883 (46 Vict. c. 3), sec. 6, 'A witness examined on an inquiry ordered under the section by the Attorney General shall not be excused from answering any question on the ground that it will incriminate him, but any statement made by him in answer to any question put to him in such inquiry shall not, except in the case of an indictment or other criminal proceeding for perjury, be admissible in evidence against him.'

Scott, *supra*, and there is no weight in the fact that the prisoner had been examined with a view to the prosecution; that is done every day in cases of perjury, and it cannot affect the admissibility of the evidence. See *Stockfleth v. De Tastet*, 4 Campb. R. 10.

(r) See also sec. 27 as to the examination of other persons as to the debtor's property or dealings.

(rr) See vol. ii. p. 417.

(s) *R. v. Highfield*, Stafford Sum. Ass. 1828, MSS. C. S. G. The prisoner was executed. See *R. v. Lewis*, *ante*, p. 512, as to an affidavit in a suit in the Ecclesiastical Court.

(t) *R. v. Goldshede*, 1 C. & K. 657. Lord Denman, C. J., who observed that 'the very oath on which an answer in chancery is given is the foundation of these indictments for perjury which we are trying almost daily.'

By the 50 & 51 Vict. c. 28, s. 19 (The Merchandise Marks Act, 1887), 'Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action; but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.'

An affidavit of a person is admissible against him in both criminal and civil cases. (*u*)

The prisoner was indicted for having made a false declaration, the statements in which subsequently became the subject of an inquiry before one of the poor law inspectors, under the authority of secs. 19, 20, of the 10 & 11 Vict. c. 90, (*v*) and the prisoner was examined on oath respecting the declaration, and her answers were reduced to writing in a minute-book, and she had affixed her mark; she was not cautioned that what she said would be used against her; and her statement was held inadmissible, on the ground that the answers were given by an illiterate person, who had not been cautioned, under the compulsion of an oath. (*w*)

A difference of opinion has existed whether the examination of a person upon oath as a witness before a coroner, be admissible in evidence against such person on his trial.<sup>1</sup> In a case tried at Worcester, where it appeared that a coroner's inquest had been held on the body of A., and, it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B. as a witness; J. A. Park, J., would not allow the deposition of B., so taken on oath, on the coroner's inquest, to be read in evidence on the trial of an indictment against B. for the same murder. (*x*)

Upon an indictment for rape against Owen, Ellis, and Thomas, it appeared that an inquest had been held upon the body of the woman alleged to have been ravished, and the coroner stated that at the inquest Owen made four statements; he had been sworn before each statement; each of the statements was taken down in writing, and signed by Owen. Ellis made and signed a statement, and so did Thomas; they were sworn before the statements were made. No inducement of any kind was held out to either of the prisoners to

(*u*) Per Lord Denman, C. J., *R. v. Goldshede*, *supra*. *R. v. Walker*, cited 6 C. & P. 161.

(*v*) Sec. 19 authorises the commissioners or inspectors to summon any person they think fit, and administer an oath, &c. Sec. 20 makes every person giving false evidence guilty of perjury, and every person who refuses to give evidence guilty of a misdemeanor.

(*w*) *R. v. Murtagh*, 6 Cox, C. C. 447. Pennefather, B., and Moore, J.

(*x*) Anonymous, 4 C. & P. 255, note (*b*). In *R. v. Clewes*, reported as to other points in 4 C. & P. 221, the grand jury asked Littledale, J., 'Can the evidence of a pris-

oner, who was examined on oath before the coroner as a witness, be admitted as evidence against the same person, when subsequently indicted for the murder of the person on whose body the inquest was held?' Littledale, J., 'Whatever any prisoner says at any time against himself is evidence, and therefore such a statement is admissible.' The preceding case was then mentioned, on which the learned judges seemed to entertain doubts upon the point, but directed the grand jury to receive the evidence, and leave the point for discussion upon the trial. MSS. C. S. G. See *post* as to depositions taken before coroners.

#### AMERICAN NOTE.

<sup>1</sup> It seems to be admissible in America. See *Hendrickson v. P.*, 1 Parker, C. R. 406. *Williams v. C.*, 5 Casey, 102. *P. v. Banker*,

2 Parker, C. R. 26. *S. v. Young*, 1 Wisc. 126.

make any statement; neither threat nor promise; they were all three brought before the coroner in custody. It was objected that these statements were not receivable in evidence, as they were on oath. These persons were in custody; and in *R. v. Wheeley*, (y) Alderson, B., rejected the statement of the prisoner, which had been taken at the inquest, because it was on oath, and taken while he was in custody. Williams, J., 'I know that my Brother Alderson did so, but I also know that since that there has been a reaction of opinion (if I may be allowed the expression); I shall therefore receive the evidence, and reserve the point if it should become necessary.' (z)

But where, upon an indictment against the same prisoners for the murder of the same female, whom they had been charged in the preceding case with ravishing, the same depositions of the prisoners, taken on oath on the coroner's inquest held on the body of the deceased, (a) were tendered in evidence; Gurney, B., said, 'I am not aware of any instance in which an examination on oath, before a coroner or a magistrate, has been admitted as evidence against the person making it. I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected. In my own experience I do not recollect a case of a deposition before a coroner.' After mentioning *R. v. Wheeler*, (b) the learned Baron added, 'I confess that I do not, on principle, see the distinction between that and some of the other cases; still I am of opinion that in the present case I ought to reject the evidence.' (c)

Upon an indictment for the murder of Elizabeth S., it appeared that no suspicion arose that her death had been caused by poison until after the death of Mary Ann S.; but the parents having insinuated that Mary Ann had been poisoned by Riley, she was taken into custody upon the charge, and on the examination before the coroner as to the cause of Mary Ann's death the mother was examined on oath as a witness, and her deposition was taken in writing, and read over to her, and she put her mark to it. In the course of that examination questions were put to her relative to the death of Elizabeth, and in consequence of her answers, and other circumstances, the body of Elizabeth was disinterred, examined, and found to contain arsenic in the stomach. The parents were thereupon taken into custody, and brought before the coroner, in custody, separately. The mother was told that she was charged with having poisoned her two children, and that that was the time when she might make any statement that she liked to the jury, and that what she said would be taken down in writing. Her former deposition made by her as a witness was then read over to her, and she said that she had a further statement to make, which she made, and what she said was written down, and afterwards read over to her; she was asked to sign it, and refused. The coroner signed it, and it was produced

(y) *Ante*, p. 511.

(z) *R. v. Owen*, 9 C. & P. 83. The report then proceeds—Mr. Tooke (the coroner) recalled: 'I asked Owen if he was desirous of giving his evidence, and he said, Yes: he was sworn, and gave evidence. I asked each of the other prisoners if he wished to give evidence, and each

said that he did.' Alderson, B., was the other judge at Stafford when this case was tried.

(a) This is the whole statement in the report.

(b) *Ante*, p. 516.

(c) *R. v. Owen*, 9 C. & P. 238.

and offered in evidence against the mother, together with her original deposition. It was objected that as the greater part of the statement had been made by the prisoner, when under examination before the coroner upon oath, it could not be read in evidence against her. Erskine, J., received the evidence, but reserved the point for the consideration of the judges. (*d*) But as the mother was acquitted, the judges thought it unnecessary to determine the question.

So on an indictment for murder, Parke, B., received in evidence a deposition made by the prisoner on oath as a witness before the coroner. (*e*) So also on a trial for manslaughter, Martin, B., after consulting Willes, J., admitted as evidence against the prisoner his deposition on oath taken by the coroner upon the inquest held on the deceased. (*f*) And where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion; no charge had at that time been made against her; she made a statement on oath, which the coroner took down in writing. Lord Campbell, C. J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed. (*g*)

The results deducible from the cases seem to be that it is now clearly settled that the mere fact of a party having been examined upon oath will not exclude a statement made by him. (*h*) It is obvious that such a statement may be just as voluntary as if it were not upon oath, as where a party tenders himself as a witness, and requests to be sworn, of his own mere motion. So too it is clearly settled that if a party be examined upon oath, and has an opportunity of objecting to answer any questions which he thinks may tend to criminate himself, but he answers such questions without objection, his answers are admissible in evidence against him in a criminal proceeding. (*i*) In such a case, by not objecting when he is entitled so to do he is taken to have answered the questions voluntarily. It is equally clearly settled that in such a case it is not necessary that the witness should have been cautioned or put upon his guard as to the tendency of the questions, in order to render his answers admissible. Lastly, if the witness objects to answer any question as tending to criminate himself, but the Court improperly compels him to answer it, the answer is not admissible against him. (*j*)

(*d*) *R. v. Sandys*, C. & M. 345.

(*e*) *R. v. Howarth*, Greenw. Coll. Stat. 137, as cited Archb. C. P. 203. See *R. v. Colmer*, 9 Cox, C. C. 506.

(*f*) *R. v. Bateman*, 4 F. & F. 1068.

(*g*) *R. v. Sarah Chesham*, Chelmsford, March 6, 1861. MSS. This note was submitted by the Editor to Lord Wensleydale, who replied that he had no doubt the note of the decision was correct; though he did not recollect that he was consulted by Lord Campbell, yet he could not doubt that he was. The evidence was not sufficient to prove that the husband died of poison, and therefore the prisoner was indicted for administering it, as Lord Campbell informed the Editor. C. S. G.

(*h*) See *R. v. Coote*, 42 L. J. P. C. 45; L. R. 4 P. C. 599.

(*i*) *R. v. Garbett*, 1 Den. C. C. 236, ante, p. 516.

(*j*) *R. v. Garbett*, ante, p. 516. *R. v. Coote*, 42 L. J. P. C. 45. It may be remarked that by the Irish Act, 9 Geo. 4, c. 54, s. 2, which was framed on the 7 Geo. 4, c. 64, s. 2, as to taking the examinations of witnesses in felony, it was provided that 'no such examination shall subject the party examined to any prosecution or penalty, or be given in evidence against such party, save on any indictment for having committed wilful and corrupt perjury in such examination;' which seems to shew that otherwise such an examination might have been given in evidence in any case.

(g) *Discoveries and Acts done in consequence of Confession unduly obtained.*<sup>1</sup>

It has been determined that, although confessions improperly obtained are not admissible, yet that any facts, which have been brought to light in consequence of such confessions, may be received in evidence. (k) Thus where a prisoner was indicted as an accessory after the fact for having received property, knowing it to be stolen, and had, under promises of favour, made a confession, and in consequence of it the property had been found in her lodgings, concealed between the sackings of her bed; it was held that the fact of finding the stolen property in her custody might be proved, although the knowledge of it was obtained by means of an inadmissible confession. (l) So where a prisoner indicted for stealing a number of diamonds and pearls had been improperly induced to make a confession, from which it appeared that he had disposed of part of them to a certain person; it was held allowable on the part of the prosecution to call that person to prove that he had received the property from the prisoner. (m) As far as these cases go, there can be no difficulty as to the propriety of the decisions, because the bare fact of the property being found in the possession of the prisoner in the one case, and of his dealing with it as his own in the other, would, unconnected with any confession, have been clear evidence in support of the prosecution. But the cases have gone further than this, for it has been held that, on a prosecution for receiving stolen goods, where a confession had been improperly drawn from a prisoner, in the course of which he described the place where the goods were concealed, evidence might be given that he did so describe the place, and that the goods were afterwards found there. (n) In this case it is clear that the bare fact of finding the goods would be no evidence against the prisoner, unless coupled with a part of the improperly obtained confession. And some have accordingly doubted whether any part of such a confession can properly be used for such a purpose. Thus, in *Harvey's case*, Lord Eldon, C. J., said, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it; and he so directed the jury in that case. (o)

(k) 1 Phill. Ev. 411. See *R. v. Leatham*, 8 Cox, C. C. 498.

(l) *R. v. Warickshall*, 1 Leach, 263, O. B. 1783. *S. P. Mosey's case*, 1 Leach, 265 n. O. B. 1784. So in *R. v. Harris*, R. & M. C. C. R. 331, *post*, p. 546, after the prisoners had been before the magistrate, one of the prisoners went with one of the prosecutors to a field, and said he could find the skin buried, and shewed the place, which was dug up and the skin found. So in *Thurtell's case*, cited in *Alison's Cr. L. of Scotland*, p. 584, and *Joy*, 84, although

a confession obtained by means of promises or hopes of impunity held out was not used in evidence against him, yet the fact that the goods were recovered or the corpse found, in consequence of the confession, at the place mentioned in the confession, was held receivable in evidence.

(m) *Lockhart's case*, 1 Leach, 386.

(n) *Grant's case* and *Hodge's case*, 2 East, P. C. 658.

(o) 2 East, P. C. 658. See also *Mosey's case*, 1 Leach, 265, in note to *Warickshall's case*.

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<sup>1</sup> See *Hudson v. S.*, 9 Yerg. 408. *S. v. Brick*, 2 Harring. 530. *C. v. Knapp*, 9 Pick. 496. *S. v. Crank*, 2 Bailey, 67. *S. v. Motley*, 7 Rich. 327. *Duffy v. P.*, 26 N. Y. 588. *Greer v. S.*, 31 Texas, 129. *Mountain v. S.*, 40 Ala. 344.

But the more established rule, according to later practice and later authorities, is, that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true. (*p*) Thus it is proper, and it is now the common practice, to leave to the consideration of the jury where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case. (*q*) So where on an indictment for burglary it appeared that the prisoner had made a statement to a policeman, under some particular circumstances, which induced the counsel for the prosecution, with the approbation of the Court, to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said, he made a search for the lantern; Tindal, C. J., and Parke, B., were both of opinion that the words used by the prisoner, with reference to the thing found, ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields. The other parts of the statement were not given in evidence. (*r*)

But where on a trial for concealing the birth of a child it appeared that, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body of the child; Erle, J., refused to receive the statement in evidence. It was then proposed to ask whether, in consequence of the answer she had given to the magistrate, the witness had made a search in a particular spot, and had found a certain thing. Erle, J., 'No; not in consequence of what she said. You may ask him what search was made and what things were found, but under the circumstances, I cannot allow the proceeding to be connected with the prisoner.' (*s*)

So it has been determined, after a consideration by all the judges, that, although a confession improperly obtained cannot be received in evidence, yet that any *acts* done afterwards may be given in evidence, notwithstanding they were done in consequence of such confession. (*t*)

And it should seem that what the prisoner says at the time such acts are done may also be received in evidence. The prisoner was charged with stealing a guinea and two promissory notes, one of which was a Bank of England note for five pounds, and the other a

(*p*) *R. v. Butcher*, 1 Leach, 265, note (*a*) to Warickshall's case, 2 East, P. C. c. 16, s. 94, p. 658.

(*q*) 2 East, P. C. c. 16, s. 94, p. 658.

(*r*) *R. v. Gould*, 9 C. & P. 364. Mr. Phillips, vol. i. p. 412, after stating this case, adds, 'But the judge in such case would direct the jury, and so it is understood did direct the jury in that case, that

his statement must not be taken as proof that he concealed, but merely as evidence that he knew of or was privy to the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.'

(*s*) *R. v. Berriman*, 6 Cox, C. C. 388.

(*t*) Warickshall's case, 1 Leach, 265.



Reading bank note for the like sum. The prosecutor had told the prisoner that he had better confess. *Chambre, J.*, held that, although the prosecutor could not be allowed to prove a confession made after this admonition, he might be permitted to give evidence that the prisoner brought to him a guinea and a five pound Reading bank note, which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him. The note thus produced the prosecutor could not identify otherwise than by its corresponding with the stolen note in the sum for which it was given, and in being a note of the same bank. Upon a case reserved, the majority of the judges (*u*) agreed with *Chambre, J.*, in thinking the conviction right and the evidence admissible. (*v*)

But not only are confessions excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements, unless confirmed by the finding of the property; for the same influence which might produce a groundless confession might produce groundless conduct. A prisoner was indicted for larceny, and had been induced by a promise from the prosecutor to confess his guilt; and after that confession he carried the officer to a particular house as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person, however, denied knowing anything about it, and the property was never found; it was held that not only the confession, but the fact of the prisoner's carrying the officer to the house as above mentioned, was inadmissible in evidence. The confession was excluded because, being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, *not being confirmed by the finding of the property*, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct. (*w*)

(*h*) *Against whom Confessions and Statements Evidence.*<sup>1</sup>

The statement or confession of one prisoner, made in the absence of another prisoner when not before a magistrate, is only evidence against himself, and not against another prisoner: (*x*) and in general,

(*u*) *Lord Ellenborough, C. J., Mansfield, C. J., Macdonald, C. B., Heath, Grose, Chambre, JJ., and Wood, B.* But *Lawrence and Le Blanc, JJ.*, were of opinion that the production of the money was alone admissible, and not his saying at the time he produced one of the notes 'that it was one of the notes stolen from the prosecutor.' And see *R. v. Jones, R. & R. 152. Ante, p. 482.*

(*v*) *R. v. Griffin, R. & R. 151.*

(*w*) *R. v. Jenkins, R. & R. 492. Mr. Phillpotts, Ev. vol. i., p. 413, says, 'It was held that the evidence of what passed between the prisoner and the officer ought not*

*to have been received, that is, it was not receivable as evidence against the third person.'* This is clearly an error; there was only one prisoner indicted, and he for the larceny, and the only question was, whether the evidence was admissible against him. If the person pointed out had been indicted as the receiver, the fact of the prisoner pointing him out as the person, in his presence, and his denial, would undoubtedly have been admissible in evidence against such person. See *R. v. Cox, 1 F. & F. 90, post, p. 526. C. S. G.*

(*x*) *Hevey's case, 1 Leach, 232.*

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<sup>1</sup> See *Fife v. C.*, 5 *Casey*, 429. *Blackman v. S.*, 36 *Ala.* 295.

the confession of one prisoner on his examination before a magistrate is only evidence against the party who made the confession, and cannot be made use of against any others, whom on his examination he confessed to be engaged with him in committing the offence; (y) and even if such confession were made before a magistrate in the hearing of another prisoner, it would not be evidence against such prisoner; on the ground that there is a regularity of proceeding adopted before a magistrate, which prevents the prisoner from interposing when and how he pleases, as he would in a common conversation, and the prisoner is brought to answer the charge and evidence given against him, and not the statement made by another prisoner. Thus where the confession was made before a magistrate in the presence and hearing of the accomplice, who did not deny it, Holroyd, J., held (z) that these circumstances were not evidence against the latter, and said that it had been so ruled by several of the judges in a similar case, which had been tried at Chester. (a) So where a confession of the principal, made before a magistrate in the presence of the receiver, in which she stated various facts implicating the receiver, and others as well as herself, was tendered in evidence; Patteson, J., refused to receive in evidence anything that was said by her respecting the receiver. (b)

Upon similar grounds also the deposition of a witness who has been examined against a person before a magistrate in a case of summary conviction is inadmissible. In an action for maliciously laying an information against the plaintiff, it was proposed to prove what a witness, called for the defendant, had said in the plaintiff's presence before the magistrate on the hearing of the information, on the ground that he had had the opportunity of cross-examining the witness, and commenting on his testimony; Parke, J., said, 'I think it is the safer course to refuse it, and to hold that the deposition of a witness taken in a judicial proceeding is not evidence, on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who, being a stranger to the matter under consideration, had not the right of interfering; and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences, therefore, cannot be drawn from his silence or his conduct in this case, which generally may in that of a conversation in his presence; and as it is only for the sake of these inferences that the conversation can be admitted, I think it better to refuse the evidence now offered.' (c)

(y) Tong's case, Kel. 18.

(z) *R. v. Appleby*, 3 Stark. N. P. C. 33. In an action of assault, the defendant offered evidence of what was said by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant; but Best, C. J., refused to admit it. *Child v. Grace*, 2 C. & P. 193.

(a) As to when the declarations of one conspirator are evidence against all his comrades, see vol. i. p. 528, *et seq.*

(b) *R. v. Turner*, R. & M. C. C. R. 347. *R. v. Swinnerton*, C. & M. 593.

(c) *Melen v. Andrews*, M. & M. 336. See *Finden v. Westlake*, *ibid.* 461, per Tindal, C. J., and see *Child v. Grace*, *supra*.

But where to an action for false imprisonment the defendant pleaded that the plaintiff had been guilty of embezzlement, and it appeared that the depositions of the plaintiff and his witnesses had been taken on that charge in the presence of the plaintiff before a magistrate, and that the plaintiff had then said, 'I submit that there is no case against me;' Lord Denman, C. J., held that the depositions must be read, and the plaintiff's answer to them; but that the depositions were not any evidence of that which was stated in them, except in so much as the plaintiff had admitted them to be true by anything that he had said. (*d*)

But if a prisoner in his examination before a magistrate makes an express reference to the examination of another prisoner, taken in his presence before the magistrate, the examination of such prisoner may be given in evidence against the prisoner so referring to it. (*e*) If a prisoner, when before a magistrate on a charge of an assault, makes a statement in answer to what the person charging him with the assault stated, the statement made by such party and the answer of the prisoner to it are admissible. Upon an indictment for murder, it appeared that the deceased made a complaint to a magistrate of the prisoner having struck him a blow (which ultimately occasioned his death), and the prisoner was in consequence brought before two magistrates for the assault, and convicted and fined. On the examination of the charge of assault the deceased made a statement, and the prisoner made a statement in answer to it. (*f*) Tindal, C. J., held that evidence of what was said by the deceased on the examination, and also what the prisoner said in answer, was admissible; but added, 'I shall not hold that what the deceased said is evidence as proving the facts he stated, as it would be if it were a deposition taken under the 7 Geo. 4, c. 64, but only evidence as producing an answer from the prisoner, like any other conversation; and I do not think it is the less evidence because it is on oath. I shall therefore admit it as a conversation.' (*g*)

(*d*) *Jones v. Morrell*, 1 C. & K. 266; and in *Simpson v. Robinson*, 15 Q. B. 511, Lord Denman, C. J., speaking of *Melen v. Andrews*, *supra*, said, 'We do not understand that case as deciding that under no circumstances can such evidence be admitted; though the learned judge thought it in that case safer and better to exclude it, and the plaintiff's counsel acquiesced; for cases might certainly be conceived in which a party, by not denying a charge so made, might possibly afford strong proof that the imputation was just.'

(*e*) Several instances have occurred where this has been done, and the case is similar to *R. v. John*, 7 C. & P. 324, and *Dennis's case*, 2 Lew. 261, where the prisoners' examinations referred to the depositions of particular witnesses, and such depositions were held to be admissible in explanation of the prisoner's statement. In such a case it should seem that it would depend on the manner in which the reference was made to the other prisoner's examination whether the facts stated in such examination were admitted or not. It might be that the prisoner's examination stated that the other

prisoner's statement was correct, and if so that would be an admission of the facts stated in it; or the reference might be such as merely to require the reading of the other examination as explanatory of the prisoner's statement, without admitting any fact stated in it. In 2 Stark. Ev. 40, it is said, 'In some instances the confession of one taken in the presence and hearing of another prisoner may be very material to explain the expressions and conduct of the latter upon that occasion; for any declarations of his, by which he assented to what was confessed by another to his own prejudice, would be admissible against him. The confession of the other may also, it seems, be evidence for the purpose of explaining such declarations.' C. S. G.

(*f*) This statement was not in writing, and objected to on that ground; but Tindal, C. J., held that, 'this being a summary conviction, is not a case in which magistrates are required to take down the evidence in writing.' And see *Robinson v. Vaughton*, 8 C. & P. 252, S. P.

(*g*) *R. v. Edmunds*, 6 C. & P. 164. This decision has been doubted, 1 Phill. Ev. 400,

And so if one prisoner were to make a confession in the presence of another prisoner, when not before a magistrate, such confession would be admissible against the prisoner in whose presence it was made, although he made no observation with reference to it; for a confession may be collected or inferred from the conduct and demeanor of a prisoner on hearing a statement affecting himself. (*h*)<sup>1</sup> But as such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution. (*i*)

Not only what is said by a prisoner, but what is said to him, or in his presence, except when before a magistrate, is admissible in evidence, and it makes no difference that what was said was said by a person who cannot be called as a witness. On an indictment for murder, some observations made to the prisoner by his wife, to which he made an evasive reply, were about to be stated, when it was objected that the statement ought not to be made, as the wife, if she could by law be examined, would give a direct contradiction to them; but Gaselee and Parke JJ., were both of opinion that the statement might be made to the jury; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule that, whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as an implied admission on his part. (*j*) So where the wife of the prisoner, who was indicted for the murder of his wife's mother, came into the room where he was in custody, and said to him, 'Oh, Bartlett! how could you do it?' He looked steadfastly at her and said, 'Ah, what! you accuse me of the murder too?' She said, 'I do, Bartlett; you are the man that shot my mother.' The prisoner did not make any reply. She then turned to the witness and said, 'This was done for money.' It was objected, that as the wife could not be examined on oath, what she had then said could not be used as evidence against him; but the evidence was held clearly admissible. (*k*)

So the confession of a thief made to a constable in the presence of the receiver is evidence against the latter that the property was stolen by the thief. (*l*)

and Joy, 79, 80, but as it should seem without any sufficient reason. The decision is precisely in conformity with the distinction taken by Best, C. J., in *Child v. Grace*, 2 C. & P. 193, *ante*, note (*z*), p. 524, and it is conceived that the evidence was admissible on the ground that at common law evidence of a deceased witness given upon oath in a judicial proceeding between the same parties is admissible in a subsequent proceeding, the party against whom the evidence is offered having had an opportunity to cross-examine

in the former proceeding. See *R. v. Carpenter*, 2 Show. 47, and the cases cited, *ante*, p. 388. C. S. G.

(*h*) 1 Phill. Ev. 400.

(*i*) *Ibid*.

(*j*) *R. v. Smithies*, 5 C. & P. 332.

(*k*) *R. v. Bartlett*, 7 C. & P. 832. See *R. v. Simons*, 6 C. & P. 540, where Alderson, B., held that what a person is overheard saying to his wife, or even saying to himself, is evidence against him.

(*l*) *R. v. Cox*, 1 F. & F. 90. Crowder, J.

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<sup>1</sup> *Donnelly v. S.*, 2 Dutch. 463, 601. *P. v. Green*, 1 Parker, C. R. 11. *Robinson v. Blen*, 20 Maine, 109.

A prisoner indicted for arson had given certain false accounts, as that he had seen the fire from his bed-room window, and had got up to see it; and it was proposed to prove that the prisoner had said to his mother, 'You know I was at home;' on which she said, 'What's the use of denying it?' but it was objected that it would have the effect, in an indirect way, of giving evidence that the prisoner was not at home on the night in question; which ought to be proved by calling the mother. *Martin, B.*, thought the evidence not admissible; for what was said in the presence of the prisoner was only admissible against him when admitted, whereas here it was denied by him. (*m*)

On an indictment for rape it has been held that what had been said by a relative of the prosecutrix to a relative of the prisoner in the presence of the prosecutrix about making it up, is admissible in favour of the prisoner. (*n*)

A statement made in the hearing of a person, though not in his actual presence, may be evidence against him. Thus it has been held that, where the plaintiff was in the kitchen of the defendant's house, and the defendant's wife stood at the head of the kitchen stairs, what she there said in a tone of voice loud enough for the plaintiff to hear was admissible against the plaintiff. (*o*)

The Court will not exclude a statement made in the prisoner's presence by another party to a third person, merely because some inducement has been held out to that party to make it; but very little weight ought to be attached to the fact of no answer being given to such statement by the prisoner, as he would not know whether it would be better for him to be silent or not. (*p*)

On an information for a libel, a book containing imputations identical with those in the libel, which had been published some time previously to the application for the information, is not admissible for the purpose of shewing that the prosecutor had tacitly acquiesced in the truth of the identical charges contained in the libel. (*q*)

Where on a trial for murder a statement by a prisoner to a policeman on a charge of robbing the deceased with violence was tendered; it was objected that it was on another charge, before the charge of murder. *Pollock, C. B.*, 'That makes no difference; whatever a man says is evidence against him—in criminal cases as well as

(*m*) *R. v. Welsh*, 3 F. & F. 275. The very ground of the objection shews that the evidence ought to have been admitted. Instead of being a statement made by the mother and denied by the prisoner, it was an assertion by the prisoner denied by the mother, which is a totally different thing, especially as no reply was made to what the mother said. It has been the constant practice to prove statements made by prisoners in the presence of persons who have denied them. C. S. G.

(*n*) *R. v. Arnall*, 8 Cox, C. C. 439. *Martin, B.*, said, 'In a civil case, what is said in the presence of either of the parties is admissible against him; because it is open to the party so present to express assent or objection to what is said, and that would be

admissible against him. In criminal cases the prosecutor, although not in strict law a party to the case, is so in fact, and I think that the rule applicable to conversation in the presence of a party in a civil case might be fairly extended to a conversation in the presence of the prosecutor in a criminal case.' Such a statement as to making up the matter would tend to affect the credit of the prosecutrix in a case of rape; and its admissibility may be more satisfactorily rested upon that ground, but she ought to have been cross-examined as to it in the first instance. C. S. G.

(*o*) *Neile v. Jakle*, 2 C. & K. 709. *Maule, J.*

(*p*) *R. v. Milton*, 10 Cox, C. C. 364.

(*q*) *R. v. Newman*, 1 E. & B. 268.

civil—at any time and on any matter. A policeman apprehends a man on a charge of highway robbery on a particular night, and he says, I cannot be guilty of that robbery, for on the same night and the same hour I was at a different place; and the policeman may, on that admission, apprehend him on a charge of murder at the time and place so mentioned, and may offer that admission in evidence against him at the trial.’ (r)

Upon an indictment for burglary, it appeared that, shortly after the robbery, four glass jars containing sweetmeats, which had been taken from the prosecutor’s, were found in the prisoner’s house, not being in any way concealed, and the prisoner’s counsel urged that this was consistent with the account the prisoner had, as he was instructed, given of the way in which the jars had come into his possession; namely, that the prisoner had found them in a field. But no one was called to prove this statement. Alderson, B., told the jury that, if it had appeared that, before suspicion attached to the prisoner, he had given this account of the possession of the property to his neighbours, the property being there at the time, and before search made, he had not the slightest doubt that, *valeat quantum*, this would have been very competent evidence for the prisoner. (s)

Upon an indictment for burning bibles, it was proposed to prove, on the part of the defendant, that he had preached sermons relating to immoral publications previously to the alleged offence, and it was urged that it was a material part of the charge that the defendant had knowingly caused the bibles to be burnt, and therefore for the purpose of shewing his intention in getting books together, his directions given in the sermons to the persons who brought in the books were admissible; but it was held that the evidence could not be given. It was true that declarations accompanying acts are admissible to show the intention at the time; and the question of intention was a very material one in the case; but it was to be inferred from legal evidence of facts, and not from declarations of the defendant on former occasions unconnected with the subject-matter of the trial. (t)

As analogous to the former part of this section, concerning admissions and confessions by the defendant himself, it may be proper in this place to mention the subject of acts and declarations of co-conspirators and of agents. How far the acts and words of one conspirator are evidence against the others, has already been mentioned in a former part of this work. (u) In order to make a client criminally responsible for a letter written by his solicitor, it is not sufficient to shew that such letter was written in consequence of an interview, but it must be shewn that it was written in pursuance of the instructions of the client. (v) With respect to the statements and acts of agents, it was decided, on the impeach-

(r) *R. v. Lee*, 4 F. & F. 63. See Fisher v. Ronalds, 12 C. B. 762 per Maule, J.

(s) *R. v. Abraham*, 2 C. & K. 550. I never have been able to discover any ground for this *obiter dictum*. Such a statement is not one accompanying an act; it is a mere declaration, and, instead of being against the interest of the prisoner, it is directly in

his favour, supposing the goods to have been stolen. C. S. G.

(t) *R. v. Petcherini*, 7 Cox, C. C. 79, Crampton, J., and Greene, B.

(u) Vol. i. p. 528, *et seq.* See also 2 Stark. Ev. tit. *Conspiracy*.

(v) *R. v. Downer*, 14 Cox, C. C. 486.

ment of Lord Melville, by the House of Lords, that a receipt given in the regular and official form by Mr. Douglas (who, it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and to sign receipts for the same), was admissible in evidence against Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money in the ordinary course of business. (*w*) In the *Queen's case*, (*x*) it was said by Abbott, C. J., in delivering the opinion of the judges, that it would not be allowable on the part of the prosecution to give evidence that an agent, who had been proved to have been employed by the defendant to procure evidence for the defence, but who had not been examined as a witness, offered a bribe to some third person, who also had not been examined. This was not the question proposed by the House of Lords to the judges, but the converse of it, considered by the chief justice, for the purpose of shewing the grounds of the determination of the judges. The actual question proposed for their consideration was, as to the competency of proving, on the trial of a criminal prosecution, certain acts supposed to have been done by the agent of the prosecutor. And they determined that similar proof, as to the conduct of the prosecutor's agent in offering a bribe, was inadmissible. The question, the Lord Chief Justice observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed by the witnesses, who had been examined in support of the indictment, and leaving therefore those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. His lordship concluded by observing that, notwithstanding the opinion he had delivered, he was by no means prepared to say, that in no case, and under no circumstances appearing at a trial, it might not be fit and proper for a judge to allow proof of this nature to be submitted for the consideration of a jury; and that the inclination of every judge was to admit, rather than exclude, the proffered proof.

There are sundry instances where an employer is criminally responsible for acts done by his agents or servants, in the course of their employment and for his benefit. Thus a master has been held criminally responsible for the sale by his servant, in the course of his employment, of bread containing a noxious quantity of alum. (*y*)

(1) *Proof of Confessions and Statements. When Onus on Prosecutor to contradict same.*

As to proof of statements made by the accused before the committing magistrates, see the next section of this chapter.

Where a confession is tendered in evidence, the proof that it was made voluntarily lies upon the prosecutor; and if it be left in doubt

(*w*) 29 How. St. Tr. 746. 1 Phill. Ev. 386.

(*x*) 2 Brod. & Bing. 302.

(*y*) *R. v. Dixon*, 3 M. & S. 11, vol. i. p. 274, and see other cases there cited.

whether the confession were made in consequence of an inducement, it will be rejected. (z)

A prisoner made a confession to an officer, who left the prisoner, and afterwards wrote down from recollection what the prisoner said to him. What the officer wrote was read over to the prisoner before the committing magistrate, and he said that what had been read over to him was the truth, and signed the paper. Best, J., 'We have not the confession of the prisoner; we have only the officer's recollection of it, put into writing when the prisoner was not present, and in the language of the officer, and not in the words used by the prisoner. If a confession be not taken in writing, we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing as a confession in writing that was not taken down from the mouth of the prisoner in his own words, nothing that he says that has any relation to the subject being omitted, nor anything added, except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his acknowledgment that it was correct, does not remove the objection. By the change of language a very different complexion might be given to the story from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower orders of men have but few words to convey their meaning, and they know as little of expressions that they are not in the habit of using as if they belonged to another language. I will not receive this paper in evidence.' (a) In the same case it is said that Dallas, C. J., had refused to receive, at a former assizes, a confession, because it was not in the prisoner's own words. So where it was proved that the examination of the prisoner before the magistrate was read over to her, and that she signed it, but there was no evidence that it was taken down from what she said or in the words she used, and in fact it was in language clearly not such as she was likely to have used; Littledale, J., refused to permit it to be read. (b) And where a witness having, in her examination before the coroner, stated that she had slept with the prisoner, that he had given her two black eyes, that they had seen a placard, &c., the statement of the prisoner before the coroner was tendered in evidence, and was as follows:— 'Prisoner admits sleeping with the witness, blackening her eyes, seeing the placard,' &c.: and it was objected that the examination was taken in the third person, which was not complying with the statute, and did not purport to be the language of the prisoner at all, but merely the coroner's expression of what he considered the prisoner to mean. The jury were to judge of the effect of the statement, and they could not do that without having before them the very words in which it had been made. Lord Denman, C. J., thought the objection of considerable importance. As to the mode of taking the examination of the prisoner, that was a very improper way in which to do it. His lordship did not, however, see how he could exclude

(z) *R. v. Warringham*, 2 Den. C. C. 447, the prisoner, and he acknowledged that it note. was correct, it was evidence.

(a) *R. v. Sexton*, 1 Burn's J., Doyl. & Wms. p. 1086. As the paper was read to (b) *R. v. Mallet*, Gloucester Spr. Ass. 1830, MSS. C. S. G. But see *post*.



the evidence, but he should reserve the point, in case it were necessary. (c)

Where the confession of a prisoner mentions the name of another prisoner tried at the same time, it seems, according to the later cases, that the whole of the confession, whether by parol or in writing, must be given in evidence. The judge will, however, in such cases, direct the jury that the confession is only to be taken as evidence against the prisoner who made it. On the Oxford Circuit it was the constant practice some years ago to omit the name of any prisoner that was mentioned in the confession of another prisoner. (d) But it has been held in many cases on that circuit (e) and elsewhere, (f) that the proper course is to state or read all the names mentioned by the prisoner in his confession. A learned judge has, however, expressed on several occasions a strong opinion that such a course is unfair. (g) If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with a witness, be brought forward, the defendant has a right to lay before the Court the whole of what was said in the same conversation;<sup>1</sup> not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. (h) But it

(c) *R. v. Roche*, C. & M. 341. Verdict, Not guilty.

(d) See *R. v. Fletcher*, 4 C. & P. 250. *R. v. Limer*, Stafford Sum. Ass. 1839, Bosanquet, J. MSS. C. S. G.

(e) *R. v. Hearne*, 4 C. & P. 215. Little-dale, J. *R. v. Clewes*, *ibid.* 221. *R. v. Daniel and Garland*, Monmouth Spr. Ass. 1831, MSS. C. S. G. Bosanquet, J., saying, 'The ground I go upon is, that I do not think I am authorised to direct the officer to read one word instead of another. I cannot tell the officer to read what is not written.' In *R. v. Giles and Betts*, Worcester Spr. Ass. 1830, MSS. C. S. G., where there was a parol confession, Littledale, J., said, 'he was satisfied the proper way was to state the names uttered by the prisoner; as to state "another person" instead of the name used was not to state the truth, which a witness was sworn to do.' In *R. v. Harding, Bailey, and Shumer*, Gloucester Spr. Ass. 1830, MSS. C. S. G., where there was a written confession, Littledale, J., said, 'Suppose two men are indicted, one as principal, and the other as accessory, and the principal is named in the indictment, and the accessory makes a confession admitting himself to be accessory

to the principal, how is it to be known that he is accessory to such principal, if the name of the principal is not to be read? I have considered this case very much indeed, and I am most clearly of opinion that it is to be read as the prisoner made it, because otherwise the evidence is not read as it was given by the prisoner. I have no doubt upon it, and will not therefore reserve the point.' *R. v. Walkley*, 6 C. & P. 175, Gurney, B.

(f) *R. v. Fletcher*, 4 C. & P. 250, Littledale, J., at York, S. C. 1 Lew. 107. Hall's case, 1 Lew. 110, Alderson, B., at Appleby. Forster's case, 1 Lew. 110. Lord Denman, C. J., at Carlisle. *R. v. Fletcher*, *supra*, was the case of a letter written by one prisoner, and implicating another.

(g) Parke, B., in *Maudsley's case*, 1 Lew. 110, and *Barstow's case*, *ibid.* It would be extremely beneficial to prisoners in such cases to be tried separately, and such a course is nothing more than expedient in cases of difficulty, as it is almost beyond the power of a jury properly to discriminate between the evidence affecting different prisoners. C. S. G.

(h) By Abbott, C. J., in the *Queen's case*, 2 B. & B. 297.

AMERICAN NOTE.

<sup>1</sup> See *Cook v. S.*, 13 S. & M. 246. *Williams v. S.*, 39 Ala. 532. *S. v. Worthington*, 64 N. C. 594. *S. v. Mahon*, 32 Verm. 241. *S. v.*

*Elliott*, 15 Iowa, 72. *S. v. Covington*, 2 Bailey, 569.

seems that proof of a detached statement made by a party does not authorise proof by that party of all that he said at that time, but only of so much as can be in some way connected with the statement proved. (i) It seems at one time to have been considered that, if a prosecutor uses the declaration of a prisoner he must take the whole of it together, and cannot select one part and leave another; and if there be no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced must be taken as true. (j) But the correctness of this position was doubted, (k) and it is now settled that the whole of the prisoner's statement must be taken into consideration by the jury, who are not bound to take what he has said in his favour to be true, because it is given in evidence by the prosecutor; but are to weigh it, with all the circumstances of the case, and determine whether they believe it or not. (l) The jury may, therefore, believe one part of the prisoner's statement and disbelieve another. (m) They may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. (n) In determining whether the statement be true or not, the jury should consider whether it be probable or improbable in itself, and whether it be consistent or inconsistent with the other circumstances of the case. (o) If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. (p) But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, precisely as in any other case, where one part of the evidence is contradictory to another. (q)

(i) *Prince v. Samo*, 7 A. & E. 627. In this case a witness stated that the plaintiff, on the trial of an indictment, had proved that he had been remanded by the Court for the relief of insolvent debtors; and it was held that the opposite counsel could not ask whether the plaintiff had not also, on the same trial, said that an advance was a gift and not a loan; and the Court said that the dictum of Lord Tenterden, *supra*, was extra-judicial.

(j) By Bosanquet, Sergt., in *R. v. Jones*, 2 C. & P. 630. So where the prisoner was indicted for a larceny, and in addition to evidence of the possession of the stolen goods, the counsel for the prosecution put in the prisoner's statement made before the magistrate, in which the prisoner asserted that he had bought the goods; Garrow, B., directed an acquittal, saying that if a prosecutor used a prisoner's statement he must take the whole of it together. *Ibid*.

(k) By J. A. Park, J., in *R. v. Lloyd*, Worcester Sum. Ass. 1830, MSS. C. S. G., and 1 Phill. Ev. 399.

(l) *R. v. Clewes*, 4 C. & P. 221, Little-dale, J. *R. v. Steptoe*, 4 C. & P. 397. *R. v. Higgins*, 3 C. & P. 603, Parke, J. *R. v.*

*Jones*, Monmouth Sum. Ass. 1830, MSS. C. S. G., J. A. Park, J. *R. v. Locker*, Stafford Spr. Ass. 1831. Patteson, J. MSS. C. S. G.

(m) 1 Phill. Ev. 399.

(n) Greenl. Ev. 253, citing *R. v. Steptoe*, *supra*. *R. v. Clewes*, *supra*. *R. v. Higgins*, *supra*, and *Respublica v. M'Carty*, 2 Dall. 86, 88.

(o) *R. v. Steptoe*, *supra*. *R. v. Jones*, *supra*.

(p) Greenl. Ev. 253.

(q) *R. v. Jones*, 2 C. & P. 630. So in a civil case, if a person says, 'that he did owe a debt, but that he had paid it,' such an admission would not be received as evidence to prove the debt, without being also evidence of the payment. Per Hale, C. J. Anonymous case, cited 12 Vin. Abr. tit. Ev. A. 23. What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable that if any part of his statement is admitted in evidence, the whole should be admitted. 1 Phill. Ev. 399. See also *Smith v. Blandy*, R. & M. N. P. C. 257. *Rose v. Savory*, 2 B. N. C. 145.

The prisoner was indicted for stealing a piece of wood, and it appeared that on the piece of wood being found by a police-constable in the prisoner's shop, about five days after it was lost, he stated that he bought it from a person named Nash, who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witness. Alderson, B., in summing up, said, 'In cases of this nature you should take it as a general principle that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to shew that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *prima facie* a reasonable account, and I ought not to be convicted of felony unless it is shewn that that account is a false one.' (r)

The prisoner was indicted for stealing a gun, which was found in his possession, and when taken into custody he stated to a policeman that he had bought the gun on the road from a tallyman for ten shillings and a gallon of beer; but when before the magistrate he stated that Heath, Randall and himself had found the gun hidden in a hayrick, and that he had given them a shilling each and a pot of beer, and had taken possession of the gun. It was urged that Heath and Randall ought to be called for the prosecution, and *R. v. Crowhurst* and *R. v. Smith* (s) were cited; but Platt, B., held that this case was very different from those cited. Here the prisoner had given two totally different accounts of the way in which he came possessed of the gun; and it certainly could not be incumbent on the prosecutor to call persons whom the prisoner had referred to in one of two contradictory statements. (t)

Where it appeared that certain cloth had been cut and carried away from a church, and a knife, which was proved to belong to the prisoner, found on the floor of the church, and in the prisoner's house several remnants of cloth were found, which corresponded with the pieces still remaining in the church, and the prisoner being charged with the offence said he knew nothing of it, and had bought the cloth of one Lake, who lived a mile off; it was contended on the authority of *R. v. Crowhurst* (u) that the prosecutor was bound to

(r) *R. v. Crowhurst*, 1 C. & K. 370. In *R. v. Smith*, 2 C. & K. 207, Lord Denman, C. J., said, 'I quite agree with *R. v. Crowhurst*, which is very correctly reported. It was mentioned to me by Alderson, B., when it occurred.' And Lord Denman added that in a similar case the magistrate should send for and examine the person mentioned, as he might either exonerate the prisoner or prove his statement to be false. The prosecution are however not bound to call the person mentioned by the prisoner if they can shew by other means that the story told by him is false. *R. v. Ritson*, 15 Cox, C. C.

478. See also *R. v. Evans*, 2 Cox, C. C. 270, vol. ii., p. 292, as to the improbabilities of a prisoner's statement.

(s) *Supra*.

(t) *R. v. Dibley*, 2 C. & K. 818. Platt, B., added, 'I think it might be prudent in the prosecutor to have the witnesses in attendance, though he does not call them, to avoid the effect of the observation by the prisoner's counsel that those persons could have substantiated the prisoner's defence, but that he was too poor to procure their attendance.'

(u) *Supra*.

call Lake as a witness. It was held, however, that that was not so; because the discovery of the prisoner's knife in the church went to shew that he himself was the thief, and therefore that the account he had so given was either not true, or not likely to be so. The prisoner, therefore, was properly left to reconcile the finding of his knife with his innocence, by shewing from Lake that he had come honestly by the cloth notwithstanding that fact; the rule on this matter being that the prosecutor was not bound to call persons named by the prisoner, unless his account was evidently true, or there was good reason to believe it to be true till it was contradicted. Here there was no such reason, as the facts were at variance with the story; but still the story might be true, and it was for the prisoner to make out its truth by calling the man from whom he bought the stolen property. (*v*)

Upon an indictment against the prisoner for stealing and receiving two waistcoats and two pairs of trousers, it appeared that the articles were stolen on the 2nd of November, and that they were sold by the prisoner for twelve shillings in a public-house openly, without attempt at concealment, on the 4th of November, when about thirty persons were in the room. To the constable, who charged him with the felony, the prisoner said, 'Cocking and Derby brought them to my house, and the woman who keeps my house (Mrs. Wilson) will say so, and I, being on the spree, sold them and spent the money.' In consequence of this statement Cocking and Derby were apprehended, and the former convicted of stealing articles taken at the same time from the prosecutor's house; but Derby was discharged for want of evidence. The constable went to Mrs. Wilson and made inquiries as to the prisoner's statement, but no evidence of what transpired on those inquiries was received. It was urged that, as the prisoner had stated how he came into possession of the articles, and had mentioned the names of real persons from whom he had received them, it was incumbent on the prosecution to negative his statement if false, by calling Cocking, Derby, and Mrs. Wilson; but the sessions overruled the objection, and the prisoner was convicted of stealing; and, upon a case reserved upon the question whether, under the circumstances of the case, which rested solely on a recent possession of the stolen goods, it lay on the prosecution to call the persons to whom the prisoner referred, or some of them, to account for his possession, it was held that there was evidence for the jury upon which the prisoner might be convicted; but Pollock, C. B., said, 'I should be sorry that, upon such evidence, any prisoner should be convicted before me.' (*w*)

For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was

(*v*) *R. v. Harmer*, 2 Cox, C. C. 487, Pollock, C. B.

(*w*) *R. v. Wilson*, D. & B. 157. The chairman told the jury that the constable having made inquiries which satisfied him (but the case does not state this), it was not necessary for the prosecution to call

the persons to whom the prisoner referred. On the contrary, however, it would rather seem that the fact that the constable did not think the persons named should be called for the prosecution, affords an inference that they would have supported the prisoner's statement. C. S. G.

made. (x) In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison to a coroner, for whom the prisoner had sent. It however appeared that, previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner, and it was suggested, on behalf of the prisoner, that he might have told the prisoner that it would be better to confess, and that, therefore, the counsel for the prosecution were bound to call him. Littledale, J., 'As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses.' (y) So where a prisoner being in the custody of two constables on a charge of arson, one Bullock went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess. It was evident that the prisoner acted under some influence, as he first proposed going into another room: and *R. v. Swatkins* (z) was relied upon. Taunton, J., 'A confession is presumed to be voluntary unless the contrary is shown; and as no threat or promise is proved to have been made by the constables, it is not to be presumed.' Having consulted Littledale, J., his lordship added, 'We do not think according to the usual practice that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement; otherwise we must in all cases call the magistrates and constables, before whom or in whose custody the prisoner has been.' (a)

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed, in the first instance, by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room, the prisoner said he wished to speak to him, and motioned the constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended that the other constable must be called to shew that he had used no inducement to make the prisoner confess. Patteson, J., 'I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the

(x) 1 Phill. Ev. 409.

(y) *R. v. Clewes*, 4 C. & P. 221. The counsel for the prosecution declined to call Mr. Clifton, and he was called and examined by the prisoner's counsel. See this case, *ante*, p. 532.(z) *Infra*.(a) *R. v. Williams*, Gloucester Spr. Ass. 1832, MSS. C. S. G. The statement was rejected on another ground. See *ante*, p. 495.

case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables.' (b)

In order to induce the Court to call another officer in whose custody the prisoner had been, it must appear either that some inducement had been used, or some express reference made to such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession which he had previously made to Williams, a constable; it was submitted that Williams ought to be called to prove that he had not used any inducement. Littledale, J., 'Although I do not think it necessary that a constable, in whose custody a prisoner has been, should be called in every case, yet as in this case there is a reference to the constable, I think he ought to be called.' Williams was then called, and proved that he did not use any undue means to obtain a confession; but he had received the prisoner from Marsh, another constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called. Littledale, J., 'I do not think it is necessary that a constable should be called, unless it appear that some promise was given, or some express reference was made to the constable. There was a distinct reference made to Williams, and therefore I thought he must be called; but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made; that might be either a confession, a denial, or an exculpation.' (c)

Upon an indictment for administering poison with intent to murder, it appeared that the prisoner had given her mistress some milk, in which a quantity of fag water had been mixed. Fag water is a mixture of arsenic, soft soap, and water, used for dressing sheep. In order to prove that the prisoner had put the fag water in the milk, that she knew the nature of it, and intended to murder her mistress, her own confession to Mr. Gilby, a medical man, made in the presence of the prisoner's mistress and her husband, was offered in evidence. Gilby swore that he did not tell the prisoner that it would be better or worse for her to tell; that he used no threats or promises, nor did any one else: before Gilby's arrival the prisoner had not made any confession, nor had any threats or promises been held out to her.

(b) *R. v. Swatkins*, 4 C. & P. 548, and MSS. C. S. G. It afterwards appeared that the prisoner had gone voluntarily before the magistrates at the inn, and then ran away, was brought back by the constable, and detained by him in the room for the purpose of being a witness, and that he was not charged with the offence till after the statement was made. Patteson, J., 'If he was not under any charge, that varies the case. As he was at that time attending as a witness, and was not in custody on any charge, I shall receive the statement in evidence, without putting the prosecutor to call the other constable.'

(c) *R. v. Warner and Morgan*, Gloucester Spr. Ass. 1832, MSS. C. S. G. The

prisoner's counsel then proposed to call Marsh, which was objected to as not being at the proper time, but Littledale, J., said, 'It is much the more convenient time to do so. If it should afterwards turn out that the confessions were in consequence of what Marsh had said, they must all be struck out, but it would be very difficult to do away with the impression they might have made on the mind of the jury.' Marsh was then called for the prisoner, and proved that when the prisoner was in his custody it was not for the offence for which he was then being tried. See this case, *ante*, p. 489. This case was tried at the same assizes as *R. v. Williams*, *supra*, but after that case had been tried. C. S. G.

Patteson, J., admitted the prisoner's statement to Gilby, who said, 'I asked her if she had given the woman anything in her milk; she said she had mixed fag water with the milk; she had put in half a teacupful. I asked her if she was aware of the nature of it; she said she knew it was poison; she thought it would kill the woman; she had done it to be released from her service.' A woman was then called who was present at this conversation, and she swore that Gilby told the prisoner in the presence of her mistress and her husband, that it would be better for her to speak the truth. She could not tell whether he had told her so before he asked her what she had done; but it was before she answered. Gilby, being recalled, said, 'I could not positively swear that I did not tell the prisoner that it would be better for her to tell the truth; I don't recollect that I did. It is very likely I might tell her it would be better for her to tell the truth.' The counsel for the prisoner contended that the confession ought to be struck out of the judge's notes, and not submitted to the jury; but after consulting Lord Denman, C. J., Patteson, J., declined to strike out the evidence of the confession, and put the whole to the jury, feeling that it was impossible, after they had heard the confession, to expect that they could weigh and consider the other facts in the case without reference to the confession; and in truth those other facts by themselves would not have warranted a conviction. The jury convicted, and upon a case reserved upon the question whether the right course had been pursued, Patteson, J., said, 'I think if it had appeared in the first instance that the medical man had used the words "it would be better for you to speak the truth," I should have excluded the evidence of the confession. The only question is, whether, when that evidence had been properly admitted, which was the case here, I ought to have struck it out of my notes, after proof that the confession was not voluntary. The prisoner was certainly bound to shew that it was not so; but that being proved by the second witness, I think I should have treated the evidence of the confession as though it had been inadmissible in the first instance.' Pollock, C. B., 'We are all of opinion that the conviction cannot be sustained.' (d)

(d) *R. v. Garner*, 1 Den. C. C. 329, 2 C. & K. 920. All that is reported to have fallen from the judges on the point is stated, because in the marginal note in Den. C. C. it is stated to have been held, 'that although the confession was rightly admitted by the judge in the first instance, and taken down by him as evidence, it should be struck out of his notes after proof by the prisoner that it had been made under the above inducement.' It is plain that the decision only warrants the marginal note I have above inserted, especially as the evidence besides the confession would not have warranted a conviction, and therefore was not enough to go to the jury. The marginal note in C. & K. is equally erroneous. Where

a jury have heard a confession proved, which afterwards turns out to have been improperly obtained, the prisoner can hardly in any case be *fairly* tried, however much the judge may endeavour to induce the jury to throw the confession out of their consideration, and it deserves consideration, whether, in order to prevent the injury that might thus arise to a prisoner, the judge would not be well warranted in discharging the jury, in order that the prisoner might be tried by another jury. *Newton's case*, 13 Q. B. 716. It might be well in such a case to ask the prisoner, whether he wished the jury to be discharged on that ground, and to discharge the jury upon his desiring it. C. S. G.

## SEC. II.

*Statements of Accused before Magistrates.*

The cases in the foregoing section are applicable to confessions by prisoners generally; the subject of confessions, contained in the statements of prisoners before the committing magistrate, remains to be considered in the present section.

*(a) Statutes in Force.*

The 11 & 12 Vict. c. 42, (e) s. 34, repeals so much of the 7 Geo. 4, c. 64, 'as relates to the taking of bail in cases of felony, and to the taking of the examinations and informations against persons charged with felonies and misdemeanors, and binding persons by recognisance to prosecute or give evidence.' (f)

Sec. 1, gives jurisdiction to magistrates over 'any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever,' and provides for the mode of bringing any person, who has committed, or is suspected of having committed, any such offence, before a justice; and by sec. 17 enacts that 'in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; (g) and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid

(e) The Irish Act, 12 & 13 Vict. c. 69, is similar to this enactment, and repeals 9 Geo. 4, c. 54, ss. 2 & 3. The 12 & 13 Vict. c. 69, is repealed by 14 & 15 Vict. c. 93.

(f) The 7 Geo. 4, c. 64, repealed prior enactments, 1 & 2 P. & M. c. 13, s. 4, and 2 & 3 P. & M. c. 10. These two last-mentioned statutes did not apply to misdemeanors or high treason. *R. v. Paine*, 1 Salk. 281. S. C. 1 Lord Raym. 729, cited by Lord Kenyon

in *R. v. Eriwell*, 3 T. R. 723. 1 Hale, 306. See *Radbourne's case*, 1 Leach, 457. Secs. 4 and 5 of 50 & 51 Vict. c. 71 prescribe the duty of coroners upon inquisitions in putting the evidence in writing and binding over the witnesses, but contain no provision as to taking the examination of any person suspected of causing the death of any person on whose body the inquisition is held.

(g) See *post*, p. 558.



it shall be proved, (h) by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.' (i)

Sec. 18. 'After the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed, as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.), and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.'

(N.) *'Statement of the Accused.'*

' : A. B. stands charged before the undersigned, [One] of Her Majesty's justices of the peace in and for the [county] aforesaid, this day of in the year of our

(h) See *Duke of Beaufort v. Crawshay*, 35 L. J. C. P. 342.

(i) The Irish Act, 14 & 15 Vict. c. 93,

s. 14, No. 1, is similar to this clause; but omits the words 'or so ill as not to be able to travel.'



before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof,' unless it shall be proved that such justice did not sign it. But sec. 18 omits the words in italics. These words in all probability were omitted accidentally in this clause; and it seems that this is so, for the Irish Act, 12 & 13 Vict. c. 69, s. 18, after the words 'without further proof thereof,' inserts 'if the same purport to be signed by the justice or justices by or before whom the same purports to have been taken.'

As to the taking of depositions of a child under the Prevention of Cruelty to Children Act, 1894, see 57 & 58 Vict. c. 41, s. 18, *ante*, p. 291.

### (b) *Mode of Taking Prisoner's Examination.*

The proper time for taking the examination of a prisoner had always been held to be after the witnesses have been examined, and he has heard what they have deposed against him; (*l*) and it is expressly made so by the new clause.

The cautions to be given by the magistrate are pointed out by the Act (*ante*, p. 539).

It ought to be left entirely to the accused whether he will make any statement or not; he ought not to be dissuaded from making a perfectly voluntary confession, because that is to shut up one of the sources of justice. (*m*) A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement, it is the duty of the magistrate to receive it. (*n*)

It seems that a statement made by a prisoner in answer to a question put by the committing magistrate is admissible in evidence. (*o*) But, as a general rule, it seems that a magistrate ought only to put questions to a prisoner for the purpose of his explaining what he has said. But questions calculated to lead to answers prejudicial to the prisoner should not be asked; and the power should in every case be used with caution and discretion.

A prisoner indicted for murder was apprehended on that charge, and immediately taken before the magistrates. An appraiser took notes of what passed, but they were not signed by any one. The prisoner was asked one or two questions by the magistrates, to which he gave certain answers, after which he was remanded. It was objected that the magistrates had no right to put these questions; they were tied down by the 11 & 12 Vict. c. 42, ss. 17 & 18, to a particular mode of procedure. It was answered that this matter fell within the proviso in sec. 18. Wilde, C.J., refused to receive the evidence. If this sort of examination were received in evidence it

(*l*) *R. v. Fagg*, 4 C. & P. 566, Garrow, B. *R. v. Bell*, 5 C. & P. 162. *R. v. Spilsbury*, 7 C. & P. 187.

(*m*) Per Gurney, B. *R. v. Green*, 5 C. & P. 312.

(*n*) *R. v. Arnold*, 8 C. & P. 621. Lord Denman, C. J.

(*o*) See *R. v. Jones*, Carr. Supp. 137, C. & P. 239 *n*. *R. v. Bartlett*, 7 C. & P. 832. *R. v. Rees*, 7 C. & P. 568. *R. v. Ellis*, R. & M. N. P. R. 432. But see *contra*, *R. v. Wilson*, Holt, N. P. C. 597.

was hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, who has power to commit him and power to release him, might think himself bound to answer for fear of being sent to gaol. The mind in such a case would be likely to be affected by the very influences which render the statements of accused persons inadmissible. (*p*)

Where on the hearing before the magistrate on a charge either of the murder or concealing the birth of her child, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body; Erle, J., refused to allow the answer to be given. The question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence an answer so irregularly elicited. (*q*)

The examination of a prisoner ought to be taken down in his very words as nearly as possible. (*r*) Where, before the late Act, it appeared to be in language the prisoner did not use, it was not admitted in evidence against him. (*s*)

The examination of a prisoner must not be taken upon oath. (*t*)

The examination of a prisoner, when reduced into writing, ought to be read over to him, and likewise tendered to him for his signature. And the magistrate is expressly required to subscribe it. (*u*) The signature, however, of the prisoner is not required by the statute, but he is to be got to sign it if he will. (*v*)

#### (*c*) Proof of Statements. Impeaching Same.

By the 11 & 12 Vict. c. 42, s. 18, where a prisoner's examination is returned with the depositions, and is in the proper form, it is admissible without any proof of the prisoner's or magistrate's signature. (*w*) It is read by the officer of the court. (*x*)

When a party charged with an indictable offence before a magistrate is asked by the magistrate, pursuant to the statute, 11 & 12 Vict. c. 42, s. 18, whether he wishes to say anything in answer to the charge, and is told by the magistrate that he is not obliged to say anything unless he desires to do so, but that whatever he says

(*p*) *R. v. Pettit*, 4 Cox, C. C. 164. In this case the proceedings of the magistrates were clearly irregular, as no witness had been examined, &c.

(*q*) *R. v. Berriman*, 6 Cox, C. C. 388.

(*r*) See *ante*, p. 539.

(*s*) *R. v. Sexton*, 1 Burn. Just. Doyl. & Wms. 1086, *ante*, p. 530. The proper course is to take the examination in the first person, *e. g.* 'I did so and so,' etc.

(*t*) Where a written examination previous to committal purported to have been taken upon oath, it was held that evidence was not admissible to shew that in fact it was not so taken, *ante*, p. 511.

(*u*) 11 & 12 Vict. c. 42, s. 18, *ante*, p. 539.

(*v*) See the form in the schedule, *ante*, p. 539.

(*w*) *Ante*, p. 539. As to proving the examination before the above Act, see 2 Hale, P. C. 52, 284. *R. v. Richards*, 1 M. & Rob. 396. *R. v. Chappell*, 1 M. & Rob. 395. Smith's case, 2 Lew. 139. *R. v. Christance*, 1 Cox, C. C. 143. In the three latter cases the prisoner had put his mark to his examination. *R. v. Hope*, 1 M. & Rob. 396. 7 C. & P. 136. *R. v. Taylor*, 7 C. & P. 136 *n.* In the two latter cases there was an attesting witness who was called. *Hobson's case*, 1 Lew. 66. *Priestley's case*, 1 Lew. 74. *R. v. Foster*, 7 C. & P. 148. *R. v. Spencer*, 1 C. & P. 260. *R. v. Rees*, 7 C. & P. 568. *R. v. Reading*, 7 C. & P. 649. *R. v. Hearn*, C. & M. 109.

(*x*) *R. v. Swatkins*, 4 C. & P. 548.

will be taken down in writing, and may be given in evidence against him upon his trial, and the prisoner thereupon makes a statement which is taken down; and the deposition containing it is duly returned, and bears upon its face that such caution has been given, and purports to be signed by the magistrate, and there is no evidence that any threat or promise has been held out to induce a confession from the prisoner; the deposition may, without further proof, be read in evidence against him on his trial, although the magistrate did not comply with the directions in the first proviso to the above-mentioned section, and give the prisoner to understand before he made his statement that he had nothing to hope from any promise of favour, and nothing to fear from any threat which might have been held out, but that what he should then say might be given in evidence against him, notwithstanding such promise or threat. *Semble*—that the last proviso to the same section overrides the whole section, and renders admissible in evidence against a prisoner any statement made by him, either before a magistrate or on any other occasion, which independently of the statute would by law be admissible as evidence against him. (y)

After taking the examination of the witnesses on a charge of felony against the prisoner, the magistrate cautioned the prisoner in the language prescribed by sec. 18 of the statute 11 & 12 Vict. c. 42, but did not, as the proviso to that section requires, tell the prisoner that he had nothing to hope from any promise of favour, or to fear from any threat. The prisoner then made a statement, which was taken down, but was not signed by the prisoner or the magistrate. The prisoner, after a remand, being brought again before the magistrate, some questions were put to the witnesses by the prisoner's attorney, who then objected to the statement being treated as the prisoner's statement, as an addition had been made to the evidence; and the prisoner being then asked if he wished to make any statement declined to do so. Held, that the prisoner's statement was admissible in evidence against him at his trial. (z)

(y) *R. v. Sansome*, 19 L. J. M. C. 143, *et per* Lord Campbell, C. J. 'In this case it appears that the deposition had been signed by the prisoner as well as by the magistrate. It is, therefore, clearly admissible in evidence at common law, unless there is some provision in the statute to exclude it. It has been argued that the statute makes it a condition precedent to its admissibility that the magistrate should have informed the prisoner that he had nothing to hope from favour, or to fear from any threat that might have been held out. There was no evidence here that any promise or threat had been held out by way of inducement. We think, therefore, that there was no necessity for shewing that there had been any caution to the prisoner in that respect; and we are of opinion that it never can be considered that the giving the second caution is a necessary condition precedent to the admissibility of the statement of the prisoner, when it has been read over to him in the manner prescribed by the former part of the section, and has been signed by him as this has been. The words of the first proviso seem merely directory on the magistrate. There is no

clause in the statute excluding the confession if the magistrate omits the second caution, when the deposition has been signed by the prisoner, and is otherwise admissible at common law. This deposition follows the form given in the schedule, which, it may be observed, contains the first caution, but not the second. Whether the giving that first caution is a condition precedent to admissibility, it is not necessary now to decide. With regard to the general question as to the admissibility of examinations of prisoners under the Act, the court are of opinion that where there is no evidence of any threat or promise having been held out to induce a confession, the examination of a prisoner may be read in evidence on his trial without further proof, if the deposition has been returned, and appears to be signed by the magistrate, and shews upon its face that the first caution has been given.' See *R. v. Sansome*, 3 C. & K. 332, 4 Cox, 203, 19 L. J. M. C. 143. See *R. v. Higson*, 2 C. & K. 169. *R. v. Kimber*, 3 Cox, C. C. 223. *R. v. Harris*, 4 Cox, C. C. 147. *R. v. Hunt*, 4 Cox, C. C. 149.

(z) *R. v. Bond*, 19 L. J. M. C. 138.

As by the statute the magistrate is expressly enjoined to put the examination into writing, it will be intended that he did as the law requires; and parol evidence of a prisoner's statement before him ought not to be received until it is clearly shewn that in fact such a statement never was reduced into writing. (*a*) And in order to render parol evidence of a prisoner's statement admissible, it is not sufficient for a witness to state that he did not see anything taken down in writing, (*b*) or that no examination was taken in writing, (*c*) but the magistrate's clerk must be called to prove that he did not take down in writing what the prisoner said. (*d*) But if in fact the examination was not taken in writing, parol evidence may be given of the prisoner's declarations. Before the 11 & 12 Vict. c. 42, Hall and two others were tried for burglary. The evidence was clear against the two others; but, excepting one or two slight circumstances, certainly not sufficient of themselves to have put Hall on his defence; the only evidence against him was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *vivâ voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. On a case reserved on the question whether this evidence of the confession was well received, all the judges, except Gould, J., were of opinion that the conviction was right. (*e*) So a written examination before a magistrate will not exclude evidence of a previous parol declaration which has not been reduced into writing. (*f*)

If an examination before a justice of the peace be taken in writing, under such circumstances of irregularity as preclude the writing from being itself given in evidence, yet the examination may be proved, as at common law, by some one who was present and heard

(*a*) Jacobs' case, 1 Leach, 309. Fearshire's case, *ibid.* 202. Hinxman's case, *ibid.* 310, note (*a*). Fisher's case, *ibid.* 311, note (*a*). R. v. Hollingshead, 4 C. & P. 242. Phillips v. Wimburn, 4 C. & P. 273. R. v. M'Govern, 5 Cox, C. C. 506. Where the law authorises any person to make an inquiry of a judicial nature, and to register the proceedings, the written instrument so constructed is the only legitimate medium to prove the result, 3 Stark. Ev. 786. Hence parol evidence cannot be received of the statement of a prisoner taken under the statute, where the examination has been taken in writing.

(*b*) Phillips v. Wimburn, 4 C. & P. 273, Tindal, C. J.

(*c*) R. v. Isaac Packer, Gloucester Spr. Ass. 1829, MSS. C. S. G. In this case the witness stated that no examination was taken in writing, and Parke, J., said, 'As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing, and unless you can clearly shew that the magistrate's clerk did not do his duty, I will not receive the evidence.' So in R. v. Phillips, Worcester Sum. Ass. 1831, MSS. C. S. G., where

a witness stated that he believed that what the prisoner said before the magistrate was not taken down in writing, but he was not quite certain that that was so; Bosanquet, J., said that the justice's clerk ought to be called to shew whether anything had been taken in writing, as it must be presumed that he had done his duty; and the clerk was accordingly called, and proved that nothing was taken in writing, and then parol evidence was received of what the prisoner said before the magistrate.

(*d*) It should seem on the same ground that, where there is no magistrate's clerk present, the magistrate should be called to prove that he did not take the examination in writing. See R. v. Harris, R. & M. 338, *post.* 546, where this course was adopted. C. S. G.

(*e*) Hall's case, cited by Grose, J., in Lambe's case, 2 Leach, 559. R. v. Huet, 2 Leach, 821. R. v. Shillcock and Barnes, Stafford Spr. Ass. 1832, MSS. C. S. G.

(*f*) R. v. M'Carty, 2 Stark. Ev. 38. See also R. v. Reason and Tranter, 16 How. St. Tr. 35, by Eyre, J. R. v. Tarrant, 6 C. & P. 182.

it, and if he were the person who wrote down the examination, he may refresh his memory with it. (g)

It seems that the prisoner may impeach the statement returned by the magistrate, and shew that it was so irregularly taken as not to be admissible. Before the Act the prisoner was always at liberty, either by cross-examination or otherwise, to shew that his statement was not admissible; and although the present enactment says that the statement may be given in evidence unless it shall be proved that the justice did not sign it, yet it never can be held that this enactment was intended to prevent the prisoner from proving that the statement was induced by promises or threats, or improperly and untruly taken down. The utmost effect that can reasonably be given to the clause is that the statement, when produced, shall be in precisely the same position as if a witness had proved the handwriting of the justice to it.

The circumstance of some part of the prisoner's statement being omitted by the magistrate, would not, it seems, render the examination inadmissible if it had been read over to the prisoner, and he has assented to its correctness. (h)

The prisoner is not to be precluded from shewing, if he can, that omissions have been made to his prejudice; for the examination has been used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial admissions. Even the prisoner's signature ought not to estop him from proving, if he can, such omissions; if the truth is, that omissions were made to his prejudice, the fact should be proved, and the prejudice suffered no longer to exist. (i)

Parol evidence is admissible to add to the written examination of a prisoner's statements made by him while before a magistrate, and which are not contained in such examination. Upon an indictment against Butler, Harris, and Evans, for stealing a ewe, the property of Bennett, it appeared that Harris, Butler, and Evans were taken before a magistrate about stealing three sheep of Bennett, Pennell, and Price; at the meeting Bennett, Pennell, and Price were all present. The magistrate identified the examinations, and said that was all that was taken down; that was what each of the prisoners said; it was all in his writing, he had no clerk; the informations were taken as to the three sheep before Evans and Harris were examined; he took down everything that they said that he heard. The papers produced contained everything as he believed that transpired before him, and he intended to take down all that was said to him, and he believed he did. The room was very full. The papers

(g) Dewhurst's case, 1 Lew. 47. Hirst's case, 1 Lew. 47. R. v. Reed, M. & M. 403. Laver's case, 16 How. St. Tr. 215. Lambe's case, 2 Leach, 257. R. v. Telicote, 2 Stark. N. P. C. 483. Foster's case, 1 Lewin, 46. R. v. Jones, 7 C. & P. 239. Thomas's case, 2 Leach, 637. R. v. Pressly, 6 C. & P. 183.

(h) Joy, 93, citing *Milward v. Forbes*, 4 Esp. 170, where an examination of the defendant before commissioners of bankrupt was admitted in evidence by Lord Ellen-

borough, C. J., although it was proved that the defendant had said more than was taken down, the commissioners having taken down only what they considered relevant, upon the ground that the party, having signed it after he heard it so stated from his own words, and read over to him before he signed it, it must be taken to be a statement of facts admitted by him.

(i) 2 Phill. Ev. 85.

produced were the depositions of Pennell, Price, and Bennett, as to the stealing of their sheep respectively, and Butler's examination and confession as to each offence. The following were the examinations of Harris and Evans:—'J. Harris being called upon for his defence, voluntarily saith that he was concerned in stealing a sheep, the property of J. Pennell, but that J. Butler was the foreleader in the business.' 'W. Evans voluntarily saith that he did not kill the sheep, but that he helped to carry it away.' A witness stated that Mr. C., the magistrate, examined Harris and Evans, and he wrote; that when Harris was asked about Bennett's sheep, Mr. C. was at the table with his paper and pen before him, but his hand was not going. What Harris said about Bennett's sheep was said to Mr. C. Mr. C. heard what Harris and also what Evans said about Bennett. He took down in writing what they said about Bennett's sheep; (j) what they said they said to Mr. C. Harris said he was connected with the taking of Bennett's sheep. Harris said they took a neddy out of the road, and put the sheep upon him. Evans said he helped to take the sheep—Bennett's sheep; this was addressed to Mr. C. Another witness said that he heard Harris say that he helped to take Bennett's sheep; that he addressed Mr. C.; that Harris said to Evans, 'Speak the truth, you may as well speak the truth as not;'; that Evans then said he helped to do it; he helped to take Bennett's sheep: what Evans said was addressed to Mr. C. The evidence of these two witnesses was objected to, but received; and, upon a case reserved upon the questions whether, as Harris and Evans had made a confession as to Pennell's sheep, which had been taken down in writing by the magistrate, any confession as to Bennett's sheep could be supplied by parol evidence; and whether, as the magistrate had taken down in writing everything he heard, and he intended to take down all that was said to him, and he believed he did, parol evidence could be given of anything else that was addressed to the magistrate; the judges were unanimously of opinion that the evidence being precise and distinct was properly received. (k)

On the part of the prosecution, the examination of a defendant, taken before a magistrate, was put in, and in it the defendant stated that the deposition of a witness, which had been taken at the same time, and before the same magistrate, was correct, Patteson, J., held that the deposition of the witness might be put in and read as a part of the defendant's statement, although the witness had been examined on the trial as a witness for the prosecution, and although possibly his deposition might have the effect of contradicting his evidence on the trial. (l) But unless the examination of a prisoner specifically refers to the deposition of a particular witness, putting in the examination of the prisoner on the part of the prosecution

(j) Quære, whether this should not be 'Pennell's sheep?' My MSS. note has no such statement of this witness, and 'Bennett' might easily be printed erroneously instead of 'Pennell.' C. S. G.

(k) R. v. Harris, R. & M. 338, Lord Lyndhurst, C. B., Bosanquet and Taunton, JJ., and Gurney, B., *absentibus*. Rowland v. Ashby, R. & M. N. P. C. 231. See Phillips,

vol. ii. p. 83. *Venafræ v. Johnson*, 1 M. & Rob. 316. *Jeans v. Wheadon*, 2 M. & Rob. 486. But see R. v. Walter, 7 C. & P. 267. R. v. Morse, 8 C. & P. 605. R. v. Lewis, 6 C. & P. 161.

(l) R. v. John, 7 C. & P. 324. The report does not state at whose instance the deposition was put in.



will not entitle the prisoner to have any of the depositions read, although they were all taken before the prisoner made his statement. (m)

Section 18 of the 11 & 12 Vict. c. 42, is only intended to apply to the concluding examination of a prisoner before the committing magistrate after all the witnesses have been examined, and does not apply to a voluntary statement made by a prisoner in the course of the examination, and before the conclusion of the case for the prosecution. Such a statement is admissible, and it is immaterial whether it is made before, during, or after a remand. (n) Therefore where a policeman took a prisoner before a magistrate, and applied to have her remanded, and produced a cash-box and iron chisel, stating his belief that it was with that instrument that the prisoner had opened the box; upon which the prisoner spontaneously, and without any question having been put to her, said that she had not opened the box by means of the chisel, but by a hammer; and no examination was taken before that magistrate, who merely granted a remand; it was held that the statement of the prisoner was admissible against her, although she had not been cautioned before she made it, and might be proved by the policeman. (o) Such a statement may be proved by any one who heard it. (p)

Where one of two prisoners was committed before the other was apprehended, and the depositions against the one prisoner were read over before the magistrate to the other prisoner, and after they were read that prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoners before himself, and the statement to the witness was not contained in it; Parke, J., held that what the prisoner had said to the witness might be given in evidence. (q) So 'an incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against him at the trial.' (r) So where a woman was before the magistrates on a charge of burglary, and in the course of the examination of a witness a glove was produced, which had been found on the man with part of the stolen property in it, on which the man said, 'She gave me the glove, but she knew nothing of the robbery:' the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statement in the depositions or examination of the

(m) *R. v. Pearson*, 7 C. & P. 671. Law, Recorder, after consulting Patteson and Williams, JJ.

(n) Per Jervis, C. J., *R. v. Stripp*, *infra*. *R. v. Bell*, 5 C. & P. 162. Lamb's case, 2 Leach, 552.

(o) *R. v. Stripp*, 25 L. J. M. C. 109. Dears. C. C. 648. *R. v. Watson*, 3 C. & K. 111. But see Garrow, B., in *R. v. Fagg*, 4 C. & P. 566. *R. v. Wilkinson*, 8 C. & P. 662.

(p) *R. v. Watson*, 3 C. & K. 111. *R. v. Bell*, 5 C. & P. 162.

(q) *R. v. Johnson and Spiers*, Gloucester Spr. Ass. 1829, MSS. C. S. G. This case was relied upon at the trial of *R. v. Harris*, *supra*, by the counsel for the Crown. MSS. C. S. G.

(r) *R. v. Moore*, Matth. Dig. C. L. 157, Parke, B.

prisoner, Erskine, J., held that what the man said might be proved by parol evidence. (s)

On the examination of a prisoner on a charge of murder, one of the witnesses stated that she had bought a pot of the prisoner, upon which one of the magistrates asked what sort of a pot it was, and the prisoner, although the question was not particularly addressed to him, made an answer. It was submitted that no evidence could be given of what passed before the magistrate except the depositions. Coleridge, J., 'What the magistrate himself said would not be taken down. That may certainly be asked.' It was then submitted that the statement made by the prisoner and signed by the magistrate must be put in before it could be asked what the prisoner said. Coleridge, J., 'There seems to be no necessity for putting in the written examination. It is not what the prisoner says when called upon for his defence that is asked, but an observation made in the course of the case, and as that would not be put down as part of his statement, I am clearly of opinion that it is receivable.' The clerk to the magistrate then proved that he took down the examination of the witnesses, and that he took down what the prisoners said when they were asked what they had to say for themselves, but that he did not take down anything which either of the prisoners said before the witnesses had been all examined. Coleridge, J., 'At the close of the evidence for the prosecution the prisoner is asked if he wishes to say anything, and if he does, it is taken down, and the evidence of that statement is the written examination; but if a prisoner says something while the witnesses are under examination that does not stand on the same ground, I shall receive the evidence.' (t)

Statements made by a prisoner while cross-examining a witness before the magistrates and reduced to writing as part of the depositions, must be proved by the depositions and not by the witness so cross-examined. (u)

The prisoner was indicted for receiving goods knowing them to have been stolen. There was a second indictment against him for breaking into and stealing from a church. When examined before the magistrate on this second charge, he made a confession as to the first charge. This was taken down in the usual manner, read over to the prisoner, and signed by the magistrate; but the prisoner refused to sign it. It was objected that the 7 Geo. 4, c. 64, only made these confessions evidence, on the authority of the magistrate's signature, when the confession was made on an examination having reference to the charge in support of which the confession was sought to be given in evidence. Erle, J., held that it mattered not for what purpose the confession was made; if it were made before a magistrate, taken down in the regular manner, and received the magistrate's signature, it thereby became valid evidence against the prisoner upon the trial of any other charge than that upon the examination in reference to which such confession had been made. (v)

(s) *R. v. Hooper*, Gloucester Sum. Ass. 1842. The clerk to the magistrates could not remember the observation, and it was proved by two policemen. MSS. C. S. G.

(t) *R. v. Spilsbury*, 7 C. & P. 187. Two cases bearing the other way are reported,

but they cannot be supported. See *R. v. Weller*, 2 C. & K. 223. *R. v. Carpenter*, 2 Cox, C. C. 228.

(u) *R. v. Taylor*, 13 Cox, C. C. 77.

(v) *R. v. Pomeroy*, 1 Cox, C. C. 231. The constable proved the facts in this case.

Where the prisoner calls witnesses whose evidence is inconsistent with his statement before the magistrate, the statement may be put in evidence in reply. On an indictment for robbery the prisoner's coat was proved to have been bloody, and a witness for the prisoner stated that on the day before the robbery he had observed that the prisoner's coat was bloody, and the prisoner gave an account of how it became so; and it was held that the prisoner's statement before the magistrate, in which he accounted for the blood on his coat in a different manner, was admissible in reply to the evidence given by the prisoner. (*w*)

The prisoner's statement is evidence against him, but not for him; and therefore it cannot be put in evidence on his behalf. (*x*)

### SEC. III.

#### *Depositions. (y)*

As examinations and depositions before magistrates originate from the same Acts of Parliament, and are in some respects guided by the same decisions, it may be proper to consider the latter immediately after the former.

#### *(a) Statutes in Force as to Depositions upon which Prisoner committed for Trial.*

By 11 & 12 Vict. c. 42, (*z*) s. 17, 'in all cases where any person shall appear or be brought before any justice or justices of the peace charged with an indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without a warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (*M.*) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices

(*w*) *R. v. White*, 2 Cox, C. C. 192. Pollock, C. B., after consulting Coleridge, J.

(*x*) *R. v. Haines*, 1 F. & F. 86, Crowder, J.

(*y*) As to a prisoner being entitled to inspect depositions, see *ante*, p. 464.

(*z*) By the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, justices of the peace were enabled and directed to take the depositions of witnesses in cases of felony; by the 7 Geo. 4, c. 64, these statutes were

repealed and re-enacted with an extension to misdemeanors, and we have seen that the 7 Geo. 4, c. 64, is repealed so far as relates to the taking of the examinations and informations against persons charged with felonies and misdemeanors, by the 11 & 12 Vict. c. 42, s. 34. The 11 & 12 Vict. c. 42, s. 17, has extended the admissibility of depositions, taken before a justice, so as to include those taken on a charge of high treason.



By sec. 28, 'the several forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.' (g)

By 30 & 31 Vict. c. 35, s. 3, 'And whereas complaint is frequently made by persons charged with indictable offences, upon their trial, that they are unable by reason of poverty to call witnesses on their behalf, and that injustice is thereby occasioned to them, and it is expedient to remove, as far as practicable, all just grounds for such complaint: Therefore, in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas, or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person for trial, or admit him to bail, shall immediately after obeying the directions of the 11 & 12 Vict. c. 42, s. 18 (*ante*), demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing, and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case, or tending to prove the innocence of the accused person, shall be bound by recognisance to appear and give evidence at the said trial, and afterwards upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.'

By sec. 4, all the provisions of the said Act 11 & 12 Vict. c. 42, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognisance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and shall have operation as part of this Act.

See 30 & 31 Vict. c. 35, ss. 6 & 7, noticed, *post*, p. 572, which give power to magistrates to examine witnesses dangerously ill.

s. 17, was exactly similar to this section excepting that it omitted the words 'or so ill as not to be able to travel.' The 12 & 13 Vict. c. 69, was repealed by the 14 & 15 Vict. c. 93: see sec. 14 of that Act, which

is similar to the repealed clause, and omits the same words as it did.

(g) See sec. 20, *ante*, p. 540, as to the mode of returning the depositions.

*(b) Depositions must be Duly Taken.*

It is a general principle of evidence that, to render a deposition of any kind admissible against a party, it must appear to have been taken on oath in a judicial proceeding, and that the party should have had an opportunity to cross-examine the witness. (*h*)

The 11 & 12 Vict. c. 42, s. 17, *ante*, p. 549, requires the oath to be administered to a witness '*before such witness is examined*,' and the statement of the witness to be taken in the presence of the accused, who shall be at liberty to put questions to any witness produced against him; and it cannot be doubted that the only regular course of proceeding is for the justice to swear the witness in the presence of the accused, and then to examine him in the presence of the accused, and then to permit the accused to put any questions he may think fit.

Where mere minutes of what each witness said before the magistrate were taken down, and the minutes were afterwards written out in the shape of depositions by a clerk in the presence of the witnesses, but in the absence of the prisoners and magistrate, and afterwards read over in the presence of the prisoners and magistrate, it was objected that the depositions were not taken according to this section; and Wilde, C. J., observed, 'So that the prisoner had a right to compare the verbal statements made with the written statements produced, which he could not do unless all the written statements produced had been made verbally in his presence.' And Maule, J., said, 'That section makes the depositions receivable in evidence upon its being first proved that they were taken in the presence of the person accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness. Therefore you would say that such full opportunity did not exist in the present case. Suppose a question to be put to the witness in the absence of the prisoner, which question involved two alternatives, and the answer to be "Yes;" the magistrate's clerk might think the answer applied to a different alternative from that to which the prisoner would have applied it, had he been present, and had an opportunity of fixing it to such alternative by cross-examination; and the magistrate's clerk might have taken down the answer in such a form as to make it seem applicable to the wrong alternative. You contend that what they call minutes would have been the depositions had they been signed, and that the minutes not being signed, there are no depositions at all.' It, however, was unnecessary to decide the point, as the case was determined in favour of the prisoners on another ground. (*i*)

(*h*) By Hullock, B., in *Attorney-General v. Davison*, 1 M'Clel. & Y. 169. *R. v. Smith*, 2 Stark. N. P. C. 211, note (*a*). *Woodcock's case*, 1 Leach, 500. *Dingler's case*, 2 Leach, 561. *R. v. Paine*, 1 Salk. 281. S. C. 5 Mod. 163, cited by Lord Kenyon in *R. v. Eriawell*, 3 T. R. 722. *Errington's case*, 2 Lew. 142, *Patteson, J. R. v. Radbourne*, 1 Leach, 457. The section does not apply to the unsworn evidence

of a child taken under s. 4 of 48 & 49 Vict. c. 69, see *ante*, p. 238. *R. v. Prunty*, 16 Cox, C. C. 344.

(*i*) *R. v. Christopher*, 1 Den. C. C. 536, 2 C. & K. 994. H. T. 1850. Before the 11 & 12 Vict. c. 42, where the greater part of the deposition of the deceased, in a case of murder, had been reduced into writing in the absence of the prisoner, but the deceased was afterwards resworn in the

On a trial for murder, Mr. Cooke, a magistrate, produced an information, and stated that he went to the house of the deceased, and found him on a pallet in a very weak state, and that the prisoner was brought to the house, where the deceased was; in consequence of the state in which the deceased was, he could say but very little at a time, and Mr. Cooke first took his information without the prisoner being present, and swore the deceased to it. Mr. Cooke then had the prisoner, who was handcuffed, brought in, and had the handcuffs taken off. Owing to the exhausted state of the deceased, the prisoner had to be brought close to the bed to hear what he said. Having then slowly read over the information to the deceased in the presence of the prisoner, and asked the deceased if it was true, and having been answered in the affirmative by him, Mr. Cooke then *reswore the deceased to his information* in the presence of the prisoner, and read over the information of the deceased to him, and while he was reading it the prisoner asked him to stop at some statement contained in it: but Mr. Cooke told him he had better read it over to the end, and that he would then read the information paragraph by paragraph distinctly to him, and that the prisoner could then put any question he wished to the deceased on each paragraph as read; that, having so read over the information, he read it over again paragraph by paragraph to the prisoner in the hearing of the deceased, and that part of it was read a third time to the prisoner; that the prisoner, having been previously duly cautioned by him, asked several questions with reference to the

prisoner's presence, and the deposition read over and stated by the deceased to be correct, and the rest of the deposition taken in the ordinary way, in the presence of the prisoner, who was asked whether he chose to put any questions; it was held by Richards, C. B., that the deposition was admissible, and a great majority of the judges, upon a case reserved, were of opinion that the evidence had been properly received. *R. v. Smith, R. & R. 339. S. C. 2 Stark. N. P. C. 208. Holt, N. P. C. 614. R. v. Hake, 1 Cox, C. C. 226.* In a previous case, *R. v. Forbes, Holt, N. P. C. 599*, where the constable stated, upon producing the deposition, that the prisoner was not present till a certain part of the deposition, distinguished by a cross, at which period he was introduced and heard the remaining part of the examination; and when it was concluded, the whole of the deposition was read over to the prisoner. Chambre, J., refused to admit that part of the deposition previous to the mark. In *R. v. Beeston, Dears. C. C. 405, Alderson, B.*, said, in *R. v. Smith*, 'I contended on the authority of *R. v. Forbes* that the deposition was not admissible, as the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers, and seeing his manner of answering; and that so much of the evidence as had been taken in the prisoner's absence was inadmissible; and I still think I was

right in that objection.' See *R. v. Calvert, 2 Cox, C. C. 491*. In a case before the above act, on an indictment for robbery, it appeared that the depositions were not written either in the presence of the magistrate or of the prisoner, but the clerk to the magistrate examined all the witnesses, and took down what they said, neither the magistrate nor the prisoner being present; but that when the magistrate and the prisoner arrived, the depositions were read over to the witnesses in the presence of the magistrate and the prisoner, and the prisoner was then asked if he had any question to put to any of the witnesses; Platt, B., said, 'This is a very irregular and improper mode of taking depositions, and very unfair to the party accused. The prisoner ought to hear all the questions put and answered, for then he may very possibly explain the circumstances; but it is monstrous that he should have a long bead roll of statements read over to him, and then be asked on the sudden if he has any question to put, and then probably, unable on the instant to extract from his accuser or the witnesses an explanation of every apparently criminating circumstance, be told that he is committed. Such a mode of proceeding does not afford to the party accused that fair play which the due administration of the law requires.' *R. v. Johnson, 2 C. & K. 394, Sum. Ass. 1846*. It does not appear whether any deposition was tendered in evidence.

matters sworn in the information, and Mr. Cooke took down each question and answer as nearly as possible in the very words of the parties. The deposition was received in evidence; but, upon a case reserved, it was held that it ought not to have been received. (*j*)

Where it appeared that a witness had been examined before a magistrate, who had asked the prisoner whether she had any questions to put, but it seemed uncertain whether she was so asked with reference to the particular examination of the witness, or after all the depositions had been read over; and it also appeared that the examinations of the witnesses had been taken in writing before the arrival of the magistrate; and that they were then read over in the presence of the prisoner, when the prisoner was asked if she had any questions to put. It was held that the deposition was not admissible; 1st, because it was the duty of the magistrate to ask the prisoner whether she would put any questions with reference to the particular witness. 2ndly, the examination of the witness having been put in writing before the arrival of the magistrate, the reading it over in her presence did not give the prisoner a proper opportunity of cross-examination; she had a right to hear the evidence given step by step, and so to have time to consider what questions to put. (*k*)

Where the prisoner and prosecutor were present before the magistrate, and the prosecutor made a statement to the magistrate, which was not taken down in writing, and the prisoner's attorney asked the prosecutor a few questions in cross-examination, and these were not taken down in writing. The case was then adjourned to the next day, when the prisoner was brought up before the same magistrate; the prosecutor was again sworn, and the magistrate's clerk read over to him a written deposition which had been taken pre-

(*j*) *R. v. Walsh*, 5 Cox, C. C. 115, M. T. 1850. There was considerable difference of opinion among the judges in this case. Monahan, C. J., was of opinion that 'what the Act of Parliament requires is, not that a witness shall depose to a written statement, but shall, in the presence of the accused, give a statement on oath, which the magistrate shall afterwards reduce into writing, and that the accused shall have an opportunity of cross-examining him, under the sanction of the same oath, whereby he swears to the information,' that the present case and *R. v. Smith* agreed in this point, that in both the witness was originally sworn in the absence of the accused; but the place where the present case failed was that, when the prisoner was brought in, the information was not taken on oath in his presence. Secondly, on the evidence of Mr. Cooke, the inference plainly arose that the oath was merely an oath to the truth of the information which had been sworn, and therefore did not extend to the answers given on cross-examination. Perrin, J., agreed with Monahan, C. J., on the first point; but added, 'The prisoner was kept hand-cuffed in another place, and here, deliberately and designedly, the magistrate

proceeded, contrary to the fair import of the statute, to take the deposition of a party not on his oath, in the absence of the prisoner, who was within call, and who was designedly kept back and not called.' Ball, J., gave no opinion on the first point, but agreed with Monahan, C. J., on the second. If the magistrate had been silent as to the form of the oath which he administered, it would have been assumed that the oath was in the usual form; but here the magistrate stated that he reswore the deceased to the truth of his information; thus confining the oath to the truth of the information; and, if this were so, the subsequent questions and answers were not under oath. Torrens, J., was of opinion that *R. v. Smith*, R. & R. 339, governed the first point, and that the oath extended to the whole, and therefore the deposition was rightly admitted. Pennefather, B., agreed with Torrens, J., on the first point, but entertained very serious doubts upon the second point. 'This case was tried in 1850, after the 12 & 13 Vict. c. 69, had come into operation, though Perrin, J., states that the 9 Geo. 4, c. 54, was then in operation. C. S. G.

(*k*) *R. v. Day*, 6 Cox, C. C. 55. Platt, B. March, 1852.



vously to the second hearing. The prisoner's attorney cross-examined the prosecutor, and that cross-examination, or some part of it, was taken down by the clerk, and from his notes afterwards a fair copy of the cross-examination was taken down on the copy which had been previously read. Hill, J., held the deposition admissible. (*l*)

Where it was proved that the deposition was taken in accordance with the invariable and long-established practice of the magistrate's Court at Liverpool, and when the prisoner was before the magistrate, he was defended by an attorney, who had a full opportunity of cross-examining, and did cross-examine, the witnesses; a note of the evidence given before the magistrates, consisting of the names of the witnesses, and the heads of what each could prove, was taken by the magistrate's clerk; afterwards the prisoner and the witnesses were taken into a room, and there another clerk, who had not been present at the examination before the magistrate, examined the witnesses from the aforesaid note, and there wrote down the answers, and the witnesses then signed the papers so written by the last-mentioned clerk; the prisoner's attorney was not there, though he might have been if he liked; and the prisoner was not asked if he would then cross-examine the witnesses, and did not cross-examine them; afterwards the prisoner and the witnesses were again taken before the magistrate, and the evidence so taken down by the clerk in the room in the absence of the magistrate was read over to them; the prisoner was not then asked if he would cross-examine the witnesses, and his attorney was not then there, though he might have been if he had liked; the magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate then signed the papers so written as last aforesaid. It was objected that the deposition was not taken in accordance with the 11 & 12 Vict. c. 42, s. 17, but the deposition was admitted; but, upon a case reserved, it was held that the depositions in this case were bad. The statute requires that they should be taken in the presence of the magistrate, and in the presence of the prisoner, and that the prisoner should have an opportunity of cross-examining the witnesses in the presence of the magistrate. In this case these provisions had not been complied with, and these depositions were taken improperly. (*m*)

Where a magistrate's clerk proved that he had taken down the examination of a witness before the magistrate, and he had no doubt that the attorney, who attended before the magistrate on behalf of the prisoner, had cross-examined the witness, but he had not taken down anything as cross-examination; he had, however, taken down everything the magistrate considered material. Erle, J., held that the deposition was admissible; all the requisites of the statute had

(*l*) *R. v. Bates*, 2 F. & F. 317. Wint. Ass. 1860. Hill, J., said, 'In the London Police Offices, where a great number of charges were daily heard, it was the constant practice to have the abbreviated notes taken during the examination of a witness by the magistrate's clerk, fair copied in full in an adjoining room, and that copy afterwards read over in the

presence of the prisoner and signed by the witness. He thought such a practice not only convenient, but within the spirit and intention of the Act, as the prisoner had full opportunity as well as the witness of objecting if the evidence were put down incorrectly.' See *ante*, p. 552.

(*m*) *R. v. Watts*, L. & C. 339, Nov. 1863.

been complied with. He did not think it the duty of the magistrate to take down every word ; for then it would be necessary to conduct the examination by question and answer. (*n*)

Where it is proved that the prisoner was present when the depositions of the deceased were taken, although the law will presume that, as he was present, he had a 'full opportunity' of cross-examining the witness within 11 & 12 Vict. c. 42, s. 17, evidence may nevertheless be offered to prove that he had not such full opportunity within sec. 17, so as to render the depositions inadmissible. (*o*)

Where, before the above Act, at the time when the deceased was examined before the magistrate she was in a rapid decline, and she stated the facts of the assault upon her by the prisoner very concisely. On a question being put to her by the clerk, she said, 'I can't answer,' and was evidently in a sinking state. Down to this period she had answered the questions satisfactorily. The clerk then said he should not put any further questions ; and it being stated that the prisoner's attorney, who was present, must have an opportunity of cross-examining the witness, he said, 'I shall decline putting any question ; the child is evidently not in a fit state to answer.' The deposition was then signed by the witness with her mark. There was no subsequent examination, and the child died soon afterwards. Platt, B., inclined to think the deposition ought not to be received. (*p*)

(*c*) *Form of Deposition. — Signing Same.*

Where upon an indictment for murder the deposition of a witness, examined before the committing magistrate, and since dead, was tendered in evidence ; there was a caption or heading at the commencement of the body of the depositions, but there was no caption at the head of this particular deposition ; and it was objected that the deposition was, on this account, inadmissible. Alderson, B., 'All that is necessary in this case is to shew that the deposition in question was regularly taken under the statute ; the heading applies to all the depositions.' And the deposition was admitted. (*q*)

The prisoner was indicted for obtaining by false pretences a promissory note for £50. Upon the trial the deposition of Mary Rowe was put in, after proof that it was taken by the committing justice in the presence of the prisoner, and that she had a full opportunity of cross-examining M. Rowe ; that it was signed by the said justice, and that M. Rowe was, at the time of the trial, so ill as not to be able to travel. The charge preferred before the said justice was that the prisoner had obtained the promissory note and other valuable securities by means of false pretences, and of this charge the prisoner was

(*n*) *R. v. Hendy*, 4 Cox, C. C. 243. Spr. Ass. 1850.

(*o*) *R. v. Peacock*, 12 Cox, C. C. 21. The prisoner's counsel gave evidence to shew that at the time the deposition was taken the prisoner was insane.

(*p*) *R. v. Hyde*, 3 Cox, C. C. 90. Ang. 4, Sum. Ass. 1848, Platt, B., however, did receive the deposition, and would have reserved the point ; but the prisoner was

acquitted. There seems no reason to doubt that if by any insuperable obstacle the prisoner is prevented from having a full cross-examination, the deposition is inadmissible, and the only question in such a case seems to be whether or not in fact the prisoner was prevented from having such full cross-examination.

(*q*) *R. v. Johnson*, 2 C. & K. 354. A.D. 1847.

informed by the said justice. The caption of the deposition of M. Rowe was 'Devon, to wit. The examination of M. Rowe, wife of W. S. Rowe, of, &c., taken on oath this 14th day of February, A. D. 1849, at, &c., before the undersigned, one of Her Majesty's justices of the peace for the said county, in the presence and hearing of H. L. (the prisoner), who is now charged before me this day for obtaining money and other valuable security for money from the said M. Rowe.' &c. It was objected that the charge set forth in the caption is obtaining money and valuable securities, but whether legally or illegally is not stated; and no offence was therefore shewn, and the said deposition consequently was not receivable in evidence. The objection was overruled; and, upon a case reserved, Wilde, C. J., delivered judgment as follows: 'The judges are unanimously of opinion that the objection is not valid, and that the deposition was properly received in evidence. The objection is not that the evidence as set forth in the examination did not sufficiently appear to relate to the charge, upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only that the title of the examination did not with sufficient distinctness state the charge against her. The title of the deposition states the occasion of its being taken, and the matter to which it refers, and there is no authority requiring any title, or as it is called caption, to the examination; and it is sufficient if it be described as the examination of the witness, and the evidence refers to the charge upon which the prisoner may be upon his trial; and as no objection was raised that the deposition was defective in that respect, we think the deposition was properly received in evidence. It may, however, not be improper to observe that the case states that the charge preferred against the prisoner was that of obtaining the promissory note and securities by means of false pretences, and that the prisoner was informed of that charge by the committing justice, and that she had a full opportunity of cross-examining the witness.' (r)

Where a woman, having been violated, cut her throat, and a magistrate was sent for, and in the presence of the prisoners, who were brought into her room, she made a statement on oath, which was taken down, read over, and signed by her. The prisoners did not in fact cross-examine her. The depositions of the other witnesses were taken before another magistrate on a charge of rape on the deceased a few days afterwards. There was no caption to the deposition of the deceased; but it was found attached to the depositions of the other witnesses, and there was a caption to these depositions, stating them to have been taken before the other magistrate. It was urged that the want of a proper caption could be supplied by parol evidence; but it was held that the 11 & 12 Vict. c. 42, s. 17, authorised taking depositions in a particular way; and unless it appeared upon the caption that the prisoners were charged with an indictable offence, the document was inadmissible. (s)

(r) *R. v. Langbridge*, 1 Den. C. C. 448. 2 C. & K. 975. A.D. 1849.

(s) *R. v. Newton*, 1 F. & F. 641. Sum. Ass. 1859. Hill, J., after consulting Wat-

son, B. If a document be inadmissible under the statute as a deposition, it might be used to refresh the memory of a person who wrote it upon hearing the evidence

By the 11 & 12 Vict. c. 42, s. 17, the magistrate is to take 'the statement' of the witness in writing, and the form in the schedule directs the deposition to be taken as nearly as possible in the words the witness uses. It cannot be necessary to take down immaterial and wholly irrelevant statements. (t)

If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate, and returned to the judge. (u)

The statute requires the deposition to be signed by the person making it; such signature was not necessary formerly for its admissibility. (v)

On a trial for manslaughter, the deposition of the deceased purported to have been made in the presence of the prisoner, and was signed by the deceased with a cross, he being a marksman. By mistake the clerk wrote the prisoner's name to the mark, so that it *primâ facie* appeared to be the deposition of the prisoner. On a case reserved it was contended that this was a patent ambiguity, which could not be explained by oral testimony. It was answered that the document was complete when the deceased put his mark to it, and that signature could not be vitiated by what another person wrote: and it was held that the deposition was properly received in evidence. (w)

The magistrate himself, however, by the 11 & 12 Vict. c. 42, s. 17, is required to subscribe the examinations and informations taken by him: and this he ought to do at each examination, and not to defer it till he determines on committing. (x)

Where a deposition had 'Kent to wit' in the margin, and purported to be 'taken on oath before us of Her Majesty's justices of the peace for the said county,' and concluded, 'This examination was taken before us in the presence of (the prisoner) at Dartford, on the day and year first above mentioned — HUGH JOHNSON;' Maule, J., was of opinion that this document was inadmissible under the 11 & 12 Vict. c. 52, s. 17, as it did not purport to be signed by,

given, and he might prove what the deceased stated. Even if there were no writing at all, the evidence given by the witness in the presence of the prisoners might be proved; for the general rule is, that 'where a witness already examined in a judicial proceeding between the same parties is since dead, his former examination is admissible as secondary evidence;' 1 Stark Evid. 61; and although the new statute clearly makes a deposition taken in pursuance of it the best evidence of what the witness stated, yet, if through the neglect of the justice or his clerk no deposition, or an irregular deposition, be taken, there is nothing in that statute to exclude the proof of the statement of the witness by other means. See *R. v. Galvin*, 10 Cox, C. C. 198. *R. v. Clarke*, 2 F. & F. 2.

(t) See per Erle, C. J. *R. v. Hendy*, 4 Cox, C. C. 243, *ante*, p. 556. The re-

pealed enactment 7 Geo. 4, c. 64, s. 2, provided that magistrates shall take 'the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing.' Per Alderson B., *R. v. Coveney*, 7 C. & P. 667. *R. v. Thomas*, 7 C. & P. 817. *R. v. Grady*, 7 C. & P. 650. *R. v. Weller*, 2 C. & K. 223. Platt, B.

(u) *R. v. Potter*, 7 C. & P. 650, note. Gaselee, J., and Vaughan, B.

(v) See *R. v. Fleming*, 2 Leach, 854, and see *R. v. Russell*, R. & M. C. C. R. 356.

(w) *R. v. Mullen*, 9 Cox, C. C. 339. The deposition was headed, 'Deposition of James Brennan,' and began, 'Taken in the presence and hearing of Peter Mullen.'

(x) *R. v. Mayor of London*, 5 Q. B. 555, 1 Seas. Cas. 40.

or to have been taken before, any justice of the peace for the county in which the prisoner was examined, although it was offered to be proved that Hugh Johnson was a magistrate, and acting as such when the examination was taken; for such proof would not make the deposition purport to be signed otherwise than it did purport.(y)

It is not necessary that the separate deposition of each witness should be signed by the justices, but it is sufficient if the depositions are signed as a body by the justices, according to the conclusion of schedule M. to the act.(z)

*(d) Deposition Admissible when Witness so Ill as not to be able to Travel.(a)*

Where on a trial for larceny a surgeon proved that a witness was suffering from bronchitis, and that her life would be endangered if she were brought into Court, it was objected that she was not proved to be so ill as not to be able to travel; but it was held that, as it was sworn that her attendance would endanger her life, the deposition was admissible.(b)

Where a witness had come to the assize town in order to attend a trial, and about half an hour before it came on was in the building where the Court sat, when a medical man advised him to return home, and swore that his remaining to give evidence would, in his opinion as a medical man, have been highly dangerous, and the witness was on his way home while the trial was going on; it was held that his deposition was admissible; for the witness was not able to travel to the place at and in which he was to give evidence. The journey was not over until he arrived at the Court, and as in the opinion of the medical man he could not without danger come to this Court, he was not able to travel to the place where his evidence must be given.(c)

So where upon an indictment for stealing, a physician proved that he had seen the prosecutor on the morning of the trial, and that he

(y) *R. v. Miller*, 4 Cox, C. C. 166. March, 1850. This decision may be right if it be confined to deciding that such an informal document is inadmissible under the statute as a regular deposition; but the deposition might have been used to refresh the memory of the justice's clerk who took down the evidence, and he might have proved what the witness deposed to before the justices.

(z) *R. v. Parker*, 39 L. J. M. C. 61. L. R. 1 C. C. R. 225. *R. v. Carrol*, 11 Cox, C. C. 322. *R. v. Young*, 3 C. & K. 106. *R. v. Lee*, 4 F. & F. 63. *R. v. Osborn*, 8 C. & P. 113. Where the depositions were on separate sheets, and were signed only at the end by the magistrate, the deposition of one of the witnesses who was dead, was admitted in evidence, although the sheets were not fastened together at the time of the signature by the magistrate, but had been afterwards attached together by the magistrate's clerk. *R. v. Lee*, 4

F. & F. 63, per Pollock, C. B.; where the cross-examination was at a subsequent time to the examination in chief, and the whole deposition was held to be irregular, as the cross-examination was not signed by the magistrate. *R. v. France*, 2 M. & Rob. 207.

(a) It is the ordinary practice for a judge to give leave for a deposition to be presented to the grand jury where a witness is ill, without preliminary proof of the illness and of the taking of the deposition. See *R. v. Gerrans*, 13 Cox, C. C. 158. As to the admissibility of the deposition of a child under the Prevention of Cruelty to Children Act 1894, see 57 & 58 Vict. c. 41, s. 14, *ante*, p. 291.

(b) *R. v. Day*, 6 Cox, C. C. 55, March, 1852. Platt, B.

(c) *R. v. Wicker*, 18 Jurist, 252. Channell, Serjt., after consulting Parke, B. March, 1854.

was not able to attend in consequence of a second attack of paralysis; he could not speak, and could not be made to hear, and if brought he would not be able to give evidence; but he might be brought without danger of his life, though he ought not to be permitted to roam abroad. He had been seen in the street the day before near his shop door. It was objected that the prosecutor was not so ill as not to be able to travel according to the words of the statute, and that an application ought to have been made to postpone the trial; but the sessions held that, as he was disabled from giving evidence at the trial by an attack of illness, not plainly appearing to be temporary, his deposition was admissible; and, upon a case reserved, it was held that this ruling was right. (*d*) So where a witness was suffering from a tendency to softening of the brain, and the surgeon proved that he was not in a condition to give evidence, as the effect of giving evidence would be dangerous to his life; but he could go to the train in a cab and by the train; he was so ill and nervous, however, that if vigorously cross-examined he would soon get confused and could not be depended upon; and, though he could travel without material injury to his health, he could not complete the object of his journey; the deposition was admitted. (*e*)

A material witness had gone before the grand jury on the first day of the session, and had gone home at night and returned in the morning for two days; but on the morning of the trial she had been seized with a bowel complaint, and when the policeman left Hounslow she was unable to travel; it was held that the deposition was not admissible, as it was not satisfactorily proved that the witness was so ill as to be able to travel. (*f*) So where a constable proved that he saw a witness in bed at nine o'clock the evening before, and he had a cold and inflammation, and was attended by a medical man, and on inquiry that morning he heard the witness was very bad; it was held that the deposition was not admissible. (*g*)

So where a witness had seen another witness, whose deposition was proposed to be given in evidence, in bed and apparently ill on the 18th of March, and she was then attended by a surgeon, and the trial was on the 23rd of March; Patteson, J., said, 'I think that, in order to allow a deposition to be read in evidence under this enactment, the surgeon should be called, if there be one attending the witness. There, no doubt, may be cases where a person may be not in a state of health to be able to be present at a trial, and yet is not attended by a surgeon, and in such cases other evidence may be sufficient, especially when the inability of the witness is of such a nature as to prevent even the possibility of his attendance as a witness;' and rejected the deposition. (*h*) So where the attorney for the prosecution proved that he had seen a witness a few days before, and found him ill of fever; Erle, J., refused to admit the deposition; as the witness, not being a medical man, could not speak

(*d*) *R. v. Cockburn*, D. & B. 203. H. T. 1857.

(*e*) *R. v. Wilson*, 8 Cox, C. C. 453, Jan. 7, 1861. The Recorder on the authority of *R. v. Cockburn*.

(*f*) *R. v. Harris*, 4 Cox, C. C. 440.

Aug. 1850. The Common Sergeant. It is not stated who proved the illness.

(*g*) *R. v. Ullmer*, 4 Cox, C. C. 442. Oct. 1850. The Common Sergeant.

(*h*) *R. v. Riley*, 3 C. & K. 116. March 1851.

as to the nature of the disease. (i) So where a police constable proved that he saw King in bed on the morning of the trial. He had fever, and the divisional surgeon was attending him. Yesterday morning he was in bed, and is not able to get up yet. He had heard that King had been confined to his bed about a fortnight; and he produced a certificate. Byles, J., refused to admit King's deposition, saying, 'I am of opinion that, to make this deposition admissible, there should be evidence of a medical man on oath, or other evidence upon oath, which the Court might think of equal value to sworn medical evidence. The constable says he has been told King is suffering from fever; how can he know the illness is of such a nature as to render the witness "so ill as to be unable to travel?" A medical man is the proper witness of that fact.' (j)

Where a material witness for the prosecution had been delivered of a child a week before, and was unable to travel; it was contended that the prosecutor knew the state in which the witness was, and ought to have applied to postpone the trial; but it was held that the deposition was admissible, as every requisition of the statute had been complied with. (k)

Where it was proved that a woman was daily expecting her confinement, and her brother stated that she was poorly otherwise, and that she was therefore too ill to travel from her residence to the place of trial, a distance of twenty-five miles; it was objected that the illness ought to have been proved by a medical man, and that the expectation of her confinement was not an illness within the 11 & 12 Vict. c. 42, s. 17; but the sessions admitted the deposition; and on a case reserved on the points raised on behalf of the prisoner, it was held that the deposition was properly admitted. The proposition that an approaching confinement was not such an illness as was contemplated by that section could not be sustained. There might be incidents attending an approaching parturition of such a nature as to bring it within the statute. The question whether the illness proved is or is not within the statute, is a question for the determination of the presiding judge, and if to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, the Court above ought not to interfere with his decision. (l)

Where a husband stated that his wife was pregnant and unable to attend; but he was unable to state how far advanced she was, and she was about the house attending to her household duties as usual, and had prepared breakfast for him that very morning as usual, and had not yet been confined to bed; but a fortnight before she had suffered somewhat in consequence of being driven to the assize town; Bramwell, B., permitted the deposition to be read. (m)

(i) *R. v. Phillips*, 1 F. & F. 105. March 1858.

(j) *R. v. Welton*, 9 Cox, C. C. 296. Nov. 1862.

(k) *R. v. Harney*, 4 Cox, C. C. 441. Aug. 1850. *Gurney*, Commr. See *R. v. Wilton*, 1 F. & F. 309. *R. v. Walker*, 1 F. & F. 534.

(l) *R. v. Stephenson*, L. & C. 165, E. T. 1862. *Erle*, C. J., thought that the sessions acted rightly in admitting the

deposition. See *Duke of Beaufort v. Crawshay*, 35 L. J. C. P. 342. *R. v. Huddersfield*, 7 E. & B. 794. *R. v. Omant*, 6 Cox, C. C. 466, July 1854. And the last cases upon the subject are to the same effect. *R. v. Wellings*, 3 Q. B. D. 426. *R. v. Heeson*, 14 Cox, C. C. 40. *R. v. Goodfellow*, 14 Cox, C. C. 326.

(m) *R. v. Croucher*, 3 F. & F. 285. Sum. Ass. 1862. The prisoner was acquitted, or the point would have been reserved.

In one case (n) Lord Coleridge, in delivering the judgment of the Court of Criminal Appeal, said, 'We think that old age, and nervousness, and inability to stand a cross-examination, is not a sufficient foundation for the reading of the deposition, and that it would raise a dangerous latitude in practice if we were to admit it upon such grounds.'

(e) *Other Cases in which Depositions Admissible.*

A deposition of a witness, who has been kept away by the procurement of the prisoner, is admissible. Scaife, Smith, and Rooke were tried for robbery, and the deposition of one Garnett, which had been regularly taken before a magistrate, in the presence of the prisoners, was tendered in evidence. Due search had been made for the witness on the part of the prosecution, but she could not be found, and did not appear on the trial, and there was evidence that she had been kept away by the procurement of Smith; but this evidence did not implicate the other prisoners. The reading of this deposition was objected to on the part of Smith; but the learned judge admitted it, being of opinion that the procurement by Smith was proved; and in summing up he left Garnett's statement, among the other evidence, to the jury, not telling them that the deposition could affect Smith only. Upon a motion for a new trial after a verdict of guilty against Scaife and Rooke, it was held that the deposition was rightly admitted in evidence against Smith; for if it be proved that a witness is kept away by the procurement of the prisoner, the deposition of that witness is admissible; but that the deposition was erroneously left to the jury against the other prisoners; for a deposition is not admissible on the ground that the prosecutor, after using every possible endeavour, cannot find the witness; and the deposition is only evidence against the prisoner who procured the absence of the witness. (o)

Where a witness, who was examined before the magistrate, is insane at the time of the trial, he is considered as in the same state

(n) R. v. Farrell, 12 Cox, C. C. 605. See R. v. Thompson, 13 Cox, C. C. 181.

(o) R. v. Scaife, 17 Q. B. 238; 2 Den. C. C. 281. E. T. 1851. Although there was nothing in the former statutes providing that the depositions taken under them should in any case be evidence, yet it was considered, that if it were previously proved satisfactorily to the Court that the witness was dead, or that he had been kept away by the practices of the prisoner, his deposition might be given in evidence on the trial of an indictment: provided the deposition were duly taken upon oath in the presence of the prisoner, when charged before a magistrate. 1 Hale, P. C. 305, 586. Bull. N. P. 242. See R. v. Shippey, 12 Cox, C. C. 161. R. v. Smith, 2 N. P. C. 211. R. v. Ward, 2 C. & K. 759. Harrison's case, 4 St. Tr. 492, 5th Res. in Lord Morley's case, Kelyng. 55. Fost. Disc. 337. Mr. Starkie in a very able note

to the case of R. v. Smith, 2 N. P. C. 211, observes that the two statutes of Ph. & M. seem to have been passed without any direct intention on the part of the legislature to use the examinations and depositions as evidence upon the trials of felons. But the taking of them having been sanctioned by the Legislature, they became, it seems, admissible in evidence upon the rules and principles of evidence already established; and the effect of the statutes in point of evidence seems to consist in removing an objection which would before have occasioned the rejection of such evidence, namely, that the proceeding was *extra-judicial*. 'The object of taking the depositions is that if any of the witnesses, whose evidence is given before the magistrates, should be unable to attend at the trial, or die, there should not by reason of this be a failure of justice.' Per Cresswell, J., R. v. Ward, 2 C. & K. 759.



as if he were dead, and his deposition may be given in evidence. (*p*) But in such a case it should be shewn that he was not insane at the time his deposition was taken. Where on an indictment for murder it was clearly proved that a witness, who had been examined before the coroner, was insane at the time of the trial, and had been so for some time previously, but there was no evidence as to the state of the mind of the witness at the time when he was examined before the coroner; and it was proposed to give his deposition in evidence, J. A. Park, J., said, 'There is one positive objection, that the witness might be insane when he was examined before the coroner;' and the deposition was rejected. (*q*) But where on an indictment for night poaching and assaulting W. Rickards it appeared that he was suffering from delirium and depression of spirits in consequence of a blow on the head, and his intellects were affected by the injury, but it was probable that he would recover: it was held that if he was actually insane at the time of the trial his deposition taken in the presence of the defendant was receivable in evidence, although the insanity might be temporary; but the medical witness, being unable to state that he was at the time of the trial in a state of insanity, the deposition was rejected. (*r*)

It has been said that the deposition of a witness beyond the sea was admissible, (*s*) but it was held before the Act that the deposition of a witness, who had been examined before the magistrate, and who had since gone to sea, was inadmissible. (*t*) And since the Act, where on a trial for larceny it was proposed to put in evidence the deposition of W. Doodt, which had been duly taken in the presence of the prisoner, who had the opportunity of cross-examination, and it was satisfactorily proved that W. Doodt was not absent with any intention of defeating justice, but, being a foreigner, serving on board a foreign vessel at the time the property was stolen, he had, since the committal of the prisoners, returned to his own country, and at the time of the trial was residing in a foreign kingdom. It was contended that, although the cause of absence was not within the 11 & 12 Vict. c. 42, s. 17, the deposition was receivable independently of that statute. But, on a case reserved, it was held that the deposition was inadmissible. Although it was quite possible that cases might occur, in which depositions would be receivable in evidence under the old rule, and independently of the statute, yet if the admissibility of depositions was extended beyond the cases provided for by the statute, the rule ought to be carefully and rigidly limited. And in this case it was consistent with what appeared

(*p*) *R. v. Eriswell*, 3 T. R. 707, per Lord Kenyon, C. J., Ashurst, J., and Grose, J., and there seems no reason to doubt that the deposition of a person who has become insane at the time of the trial would be admissible since the statute, either on the same ground as *R. v. Scaife*, *supra*, or *R. v. Cockburn*, *ante*, p. 560, was decided.

(*q*) *R. v. Charles Wall*, Worcester Sum. Ass. 1830. See this case more fully stated, *post*, p. 572. In *R. v. Eriswell*, *supra*, the pauper, whose examination was in question,

had become insane after the examination was taken.

(*r*) *R. v. Marshall*, C. & M. 147, Ludlow, Sergt., after consulting Coltman, J. It is not stated in the report when the blow on the head was inflicted.

(*s*) Bull. N. P. 242.

(*t*) *R. v. Hagan*, 8 C. & P. 167, Bolland, B., and Coltman, J. By consent of counsel for the Crown, it seems it might be read for the prisoner. S. C. See *R. v. Hunt*, 2 Cox, C. C. 261.

that the attendance of the witness might have been obtained, and it was not shewn that anything was done by writing or otherwise to procure his attendance. (u)

One of the objects of passing these statutes was to enable the judge and jury before whom the prisoner is tried to see whether the evidence of the witnesses at the trial is consistent with the account given by them before the committing magistrate; (v) and therefore an information, when judicially and regularly taken, may be used on the part of the prisoner, when the informant gives his evidence at the trial, to contradict his testimony. Thus it was admitted in *Lord Stafford's case*, (w) that the deposition of a witness, taken before a justice of the peace, might be read at the desire of the prisoner, in order to take off the credit of the witness, by shewing a variance between the deposition and the evidence given in Court *viva voce*. And not only on the part of the prisoner, but of the Crown, by the permission of the judge, depositions may be so used, even for the purpose of impeaching the credit of a witness called for the prosecution.

Thus where a witness for the prosecution, on being examined, gave a different account of the transaction from what he had deposed to before the committing magistrate, and the counsel for the prosecution proposed to contradict him by proving the deposition, which was objected to on the part of the prisoner; Bayley, J., after consulting Holroyd, J., admitted the proposed contradiction. (x) And see as to the present practice 28 & 29 Vict. c. 18, s. 3, noticed *post*, ch. 5, s. 2.

(f) *When Depositions Admissible upon Trial of a Different Offence.*

If the depositions were duly taken before the statute, they were receivable in evidence, after the death of the deponent, not only upon the trial of the prisoner for the offence with which he was charged at the time they were taken, but upon an indictment for another offence. Thus a deposition was held admissible in a case of murder, although it was taken when the prisoner had been brought before two magistrates upon a charge of an assault upon the deceased, and also upon a charge of robbing a manufactory which the deceased had been employed to guard. (y)

But the particular wording of the 11 & 12 Vict. c. 42, s. 17, has led to some doubt upon this subject. (z)

(u) *R. v. Austin*, Dears. C. C. 612, 7 Cox, C. C. 55. Jan. 1856.

(v) See the judgment delivered by Grose, J., in *Lambe's case*, 2 Leach, 558. 2 Phill. Ev. 76.

(w) 3 St. Tr. p. 131. 2 Phill. Ev. 76.

(x) *R. v. Boyle*, cited in *Wright v. Beckett*, 1 M. & Rob. 422. *Oldroyd's case*, R. & R. 88. *Wright v. Beckett*, 1 M. & Rob. 414. *R. v. Hallett*, 9 C. & P. 748. *R. v. Williams*, 6 Cox, C. C. 343.

(y) *R. v. Smith*, R. & R. 330. S. C. 2 Stark. N. P. C. 208. Eleven of the judges met. Abbott, J., thought the evidence ought not to have been received. Dallas,

J., Graham, B., Richards, C. B., and Lord Ellenborough stated that they should have doubted the admissibility of the evidence but for the case of *R. v. Radbourne*, 1 Leach, 457. *R. v. Shippey*, 12 Cox, C. C. 161.

(z) In *Candle v. Seymour*, 1 Q. B. 889, where a clerk went up stairs and took the information of a girl as to an assault, on oath, whilst the magistrate remained in the kitchen, and it did not appear that he heard what the girl said, it was held that the information was illegally taken, as it was not taken in the presence of the magistrate. Coleridge, J., said, 'It is far too

Upon an indictment for wounding T. Goode with intent to do him grievous bodily harm, it appeared that at the time of the trial T. Goode was too ill to attend, and that his deposition had been taken before the committing magistrate according to the 11 & 12 Vict. c. 42, s. 17, on a charge of assault against the prisoner, which was founded on the same identical evidence as was offered in support of the present indictment: and it was held that this deposition was not admissible in evidence upon this indictment. Where a prisoner was taken before a magistrate on any charge, his attention would necessarily be directed to that particular charge, and his cross-examination would probably be directed to meet such charge alone; in addition to which, cases might well be supposed in which the justice might prevent the prisoner from cross-examining as to anything which did not appear to him relevant to the particular charge then pending before him. Upon these grounds it would be very unreasonable to permit a deposition taken on a charge for one offence to be admitted against a prisoner on a trial for a different offence. Then, if the words of the section itself were carefully examined, it was plain that they only authorised the giving in evidence of a deposition upon an indictment for the very same offence as was 'charged' before the justice. The section commences by directing the manner in which a deposition is to be taken against any person 'charged with any indictable offence,' and afterwards provides that 'if upon the trial of the person *so accused*' certain proof be given, such deposition may be read 'as evidence in *such* prosecution.' Now that must mean a prosecution for the very offence 'charged' before the justice. (a) Whether, therefore, the reason of the thing or the words of the section were considered, a deposition could only be admissible where the indictment was for the same identical offence as that 'charged' before the justice, and upon which such deposition was taken, and consequently this deposition must be rejected. (b)

But where the prisoner was indicted for manslaughter, and the deposition of the deceased had been taken on a charge that the prisoner did feloniously stab, cut, and wound the deceased, of which stabbing, cutting, and wounding the deceased was likely to die, and the preceding case was cited; Wightman, J., received the deposition, saying, 'There is no decision precisely in point. The case cited differs in one respect from this. There the original charge was an assault; here there is something more.' (c)

common a practice for the clerk to examine the witness apart, and take down the answers, and then read them over in the magistrate's presence; and again, 'A magistrate taking depositions has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given. If he does not, how is he in a condition, supposing the charge were felony, to decide whether or not bail shall be taken?'

(a) Sec. 20 also shews that this is the meaning of this section, for, if a party be bound by recognisance to give evidence against a prisoner for one offence (an assault), he clearly would not forfeit his

recognisance by failing to give evidence against such prisoner for another offence (feloniously wounding).

(b) *R. v. Ledbetter*, 3 C. & K. 108. Sum. Ass. 1850. Greaves, Q. C., after consulting Lord Campbell, C. J., and Williams, J., and referring to *R. v. Smith*, *supra*. Lord Campbell, C. J., thought that the authority of *R. v. Smith* was very much impaired by the dissent of Lord Tenterden, and all agreed that that case was not binding under the 11 & 12 Vict. c. 42, s. 17.

(c) *R. v. Dilmore*, 6 Cox, C. C. 52, March, 1852. The point would have been reserved, but the prisoner was acquitted.

On a trial for murder it appeared that between the blow and the death the deposition of the deceased had been duly taken before a justice, in the presence of the prisoner, on the charge of wounding the deceased with intent to do some grievous bodily harm to him, and the admission of this deposition was objected to on the ground that the deposition was not taken on the same charge for which the prisoner was on his trial, and the two preceding cases were cited; but the deposition was received, and, on a case reserved on the question whether the deposition taken on the charge of maliciously wounding with intent, &c., was properly received in evidence, it was held that it was. Before the passing of the 11 & 12 Vict. c. 42, the deposition would have been admissible, (d) and there was nothing in the 11 & 12 Vict. c. 42, to render it inadmissible, or to restrict the rule, which had been established by practice since the statutes of Philip and Mary. The legislature has provided 'that the persons whose evidence is to be taken shall be "those who shall know the facts and circumstances of the case," not of the particular technical charge on which the prisoner is afterwards tried; and then it says that if the witness be dead the deposition may be admissible "on the trial of the person so accused," not on his trial for the particular offence with which he was charged before the magistrate; and though the charge at the trial be not identically the same as that made when the deposition was taken, no harm can result from holding it admissible; because it would always be matter for inquiry by the judge trying the case whether the prisoner had had a full opportunity for cross-examination; if the charge on which the deposition was taken was not identical with that stated in the indictment.' (e) 'The question is not whether the charge made on the inquiry before the magistrate was exactly the same as that made on the trial, but whether the inquiry was such as afforded to the party accused a full opportunity of cross-examination?' (f) 'In *R. v. Ledbetter* it might very well have been that a full opportunity of cross-examination was not afforded. On a charge for a common assault, the wounding subsequently charged in an indictment might not have been material; (g) but here the whole of the circumstances which came before the Court at the trial were before the magistrate, with the single exception of the death of the deceased; and the prisoner's opportunity of cross-examining was so complete, that his counsel's ingenuity could not suggest a question on the one inquiry which would not have been so on the other.' (h) If this construction were not the true one, the deposition of a person, who afterwards died, could never be used on a trial for the murder or manslaughter of that person. (i)

But this case by no means decides that a deposition would be admissible if the charges on the two occasions were substantially different. (j)

(d) *R. v. Radbourne*, 1 Leach, 457. *R. v. Smith*, *ante*, p. 564.

(e) Per Jervis, C. J.

(f) Per Alderson, B.

(g) Alderson, B., added, 'I therefore do not say whether Mr. Greaves was or was not wrong in rejecting the deposition in that case.'

(h) Per Alderson, B.

(i) *R. v. Beeston*, Dears. C. C. 405, M. T. 1854.

(j) In *R. v. Beeston*, Jervis, C. J., said, 'I do not mean to say that a deposition would be admissible if the charges on the two occasions were substantially different.'

Where on an indictment for murder by administering poison with intent to procure abortion, the deposition of the deceased had been taken on a charge against the prisoner of having administered, or caused to be taken, poison in order to procure abortion; Cockburn, C. J., admitted the deposition, being disposed to think that, the transaction being the same, the evidence was admissible, although, in consequence of the death of the woman having supervened, the charge had assumed a different shape and character. (*k*)

Where on a trial for murder it appeared that the prisoners had been originally apprehended on a charge of robbing the deceased with violence, and the death was alleged to have been caused by that violence; Pollock, C. B., admitted the deposition of the deceased, which had been made, on the charge of robbery with violence, in the presence of both prisoners, with a full opportunity of cross-examination. (*l*)

Where a prisoner is charged before a magistrate with obtaining money by false pretences, and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction, and being in fact identical, and the prisoner having had the opportunity of cross-examination before the magistrate: held, that the deposition of a witness taken at such hearing, and who was afterwards unfit to travel to give evidence, was admissible and might be read at the trial for uttering the forged promissory note. (*m*)

On a trial for murder it appeared that the deceased had sworn an information for rape against the prisoner in his presence, and had subscribed it with her mark, before a magistrate, and the prisoner had executed a recognisance, with sureties, to appear to the charge at the ensuing assizes; before which, however, he married the deceased, but they never lived together after the marriage; and statements of the prisoner were proved tending to shew that he married her to prevent the prosecution, and he had said that he would give her a short life. Christian, J., received the information and recognisance; but he told the jury that they were not to regard them as evidence of anything, save simply of the facts that, before the parties married, such a charge had been made, and the prisoner placed under recognisances to stand his trial for it; that they had nothing whatever to do with the question whether the charge was true or false, but that the facts evinced by the mere existence of these documents might be taken into their consideration, along with the other circumstances, specially as bearing upon the question of the existence of a motive, which might have prompted the prisoner to the commission of the murder. And, on a case reserved, it was held that this evidence was properly admitted. It was not offered as evidence of an information taken under the statute, but was given in evidence as a charge found to be in writing, and which happened to be in writing, because the information was made upon a certain

(*k*) *R. v. Fretwell*, L. & C. 161, E. T. 1862. The point was reserved together with another, which being decided in favour of the prisoner, this point was not noticed.

(*l*) *R. v. Lee*, 4 F. & F. 63. Spr. Ass. 1864.

(*m*) *R. v. Jenkin Williams*, 12 Cox, C. C. 101.

occasion. The recognisance of the prisoner was taken upon the same occasion as that on which the charge was made, and was also in writing, and was no more to be regarded than if the statute had never been made. If the charge rested on parol evidence, and the party by whom it had been made had used expressions equivalent to what appeared in the information, all that might have been given in evidence; but nothing of the sort could here be given in evidence, as all of it was in writing, and the only proper evidence of the writing was the documents containing the matters which had been so committed to writing. The documents were not given in evidence to substantiate the truth of the charge, but merely as to the fact that they had been made, and that the prisoner had entered into the recognisances. (n)

(g) *Proof of Depositions on Trial.*

It is the duty of magistrates to return to the Court at which the prisoner is to be tried, all depositions that have been taken at all the examinations that have taken place respecting the offence which is to be the subject of the trial. (o)

And it is equally the duty of the magistrate to return the depositions of witnesses who are not bound over. (p)

As to returning depositions taken on behalf of the prisoner; see 30 & 31 Vict. c. 35, s. 3, noticed *ante*, p. 551. (q)

By the 11 & 12 Vict. c. 42, s. 17, (r) after it has been proved that the witness is 'dead or so ill as not to be able to travel,' it must be proved, 1st, that 'the deposition was taken in the presence of the person so accused;' and 2ndly, 'that he or his counsel or attorney had a full opportunity of cross-examining the witness;' and then, 'if such deposition purport to be signed by the justice' or justices by or before whom the same purports to have been taken, the deposition may be read as evidence without further proof, unless it shall be proved that the deposition was not in fact signed by the justice purporting to sign the same.

A deposition taken before a coroner may be proved by the coroner, or by any person who can prove the signature of the coroner, that the witness was sworn, that the deposition contains the evidence given by the witness, and that the prisoner was present and had an opportunity of cross-examining the witness. The deposition in this case need only contain so much of the evidence as is material. (s)

Where, before the 11 & 12 Vict. c. 42, it was proposed to prove the deposition of a witness in order to cross-examine her upon it, and neither the magistrate nor his clerk were at the assizes, and the

(n) *R. v. Lydane*, 8 Cox, C. C. 38.

(o) *R. v. Simons*, 6 C. & P. 540.

(p) *R. v. Smith*, 2 C. & K. 207. Lord Denman, C. J.

(q) See 11 & 12 Vict. c. 42, s. 25; 7 C. & P. 270. 2 C. & K. 845. *R. v. Clark*, 5 Cox, C. C. 230. *R. v. Fuller*, 7 C. & P. 269. Vaughan, J. See *R. v. Arnold*, 8 C. & P. 621.

(r) *Ante*, p. 549. Before this Act depositions might be proved by any one who was present when same were taken. *R. v. Pikalsley*, 9 C. & P. 124. *R. v. Wilshaw*, C. & M. 145, but see 2 Hall, P. C. c. 38, p. 284.

(s) See the 7 Geo 4, c. 64, s. 4, *ante*, p. 538, note (f). See England's case, 2 Leach, 770, as to proof of depositions before coroners.

witness denied her mark to the deposition; but a constable, who was present before the magistrate when the witness was examined, proved the signature of the magistrate, but was not sure that he saw the witness make her mark to it, though he recollected seeing the pen in her hand, and heard her deposition read over to her, and believed the deposition to be the same that was read over to her, and his own deposition immediately followed it; Coleridge, J., held that the deposition might be read to the witness to examine her upon it. (t)

Upon an indictment for ravishing Sarah Higgins, it appeared that she was a person of very weak intellect; but her deposition before the magistrate was in the usual form, and did not shew anything as to any inquiry into the competency of the witness in point of intellect; and when she was called as a witness, she appeared not at all to understand the nature of an oath, and to have no idea of a future state; upon which Wilde, C. J., observed, 'It would be always desirable, where a person of weak intellect is examined before a magistrate in a case of felony, that the magistrate's clerk should take down in the depositions the questions put by the magistrate, and the answers given by the witness as to the witness's capacity to take an oath.' (u)

And since, as in the case of examinations, it will be intended that the magistrate, according to his duty, took the deposition in writing, parol evidence of the information is inadmissible, till it is shewn that it was not reduced to writing. (v) Thus where the plaintiff had been arrested on a charge of felony and taken before a magistrate, who discharged him, and there was no positive evidence whether the examinations of the witnesses had been taken in writing, and it was urged that, as no case had been made out against the plaintiff, it was to be presumed that no depositions had been taken in writing; Jervis, C. J., said, 'The statute positively requires every examination before justices to be taken down in writing. I know this is frequently neglected under the circumstances mentioned, but it is a practice quite illegal and highly improper. I cannot in any case presume that the law has been violated, and therefore without positive evidence that in this case the examinations have not been taken down, I cannot admit parol evidence.' (w)

Where on the trial of an action for a malicious prosecution it appeared that the defendant had made a charge against the plaintiff before a magistrate, the hearing of which was in the first instance adjourned, and on a subsequent occasion the case was heard, and the depositions were gone through, taken down, and the plaintiff committed for trial. A magistrate's clerk attended on the first occasion, and took down what the defendant said, but neither the defendant

(t) *R. v. Hallett*, 9 C. & P. 748. Coleridge, J., said 'Suppose there was no mark at all, why should not a third person say that this was the paper that was read over to the witness?'

(u) *R. v. Painter*, 2 C. & K. 319. With all deference, such questions and answers are preliminary to the swearing of the witness, and cannot therefore form any part of

the deposition. It might be well, however, to make a note of the questions and answers either on another paper, or separately from and so as form no part of the deposition. In a confession, such as *R. v. Dingley*, 1 C. & K. 637, of course anything the prisoner says may be inserted. C. S. G.

(v) *R. v. Fearshire*, 1 Leach, 202.

(w) *Parsons v. Brown*, 3 C. & K. 295.

nor the magistrate signed it; it was objected that parol evidence of what the defendant said on the first occasion was inadmissible, and that the writing must be produced. Cresswell, J., 'I know from the depositions returned to me at the assizes, that in practice, when a case is adjourned, the depositions are not regularly reduced to writing under the statute; and I think that parol evidence is admissible here of what was said on the first occasion. If two persons are present on the examination of a witness, and one takes a note of what the witness says, and the other does not, the latter is as competent as the former to prove what he heard.' (x)

Where in an action for maliciously laying an information before a magistrate, that he, the defendant, apprehended danger to his life or bodily harm from the plaintiff, the information of the defendant, taken in writing by the magistrate's clerk was put in, after being proved by the clerk, and after it was read the counsel for the defendant asked the clerk in cross-examination whether the defendant had not, in addition to what appeared in the information, stated that, on the occasion deposed to, the plaintiff had used a certain threat; and the question was objected to on the ground that it went to explain or add to the written information; Gaselee, J., as the point was a difficult one and of frequent occurrence, consulted the other judges of the Court of Common Pleas, and stated that they all were of opinion that evidence was admissible to prove anything the party had said as part of his information, beyond what was put in writing, either for the purpose of explanation or addition. (y) Upon an indictment for obtaining money by false pretences, a witness was examined for the prosecution, who had been examined before the magistrates, *on the application of the prisoner*, touching the present charge, and the prisoner's counsel now asked him whether, when he was before the magistrate, he did not say, *whilst under cross-examination by the prisoner's attorney*, that he knew the prisoner was collecting rates after the 24th of June. This question was objected to on the ground that the depositions being referred to, contained no note of any such cross-examination. But Erle, J., was of opinion that the question must be allowed. There did appear to have been decisions the other way, but he had always been of opinion that in principle those decisions were wrong. (z)

(x) *Jeans v. Wheedon*, 2 M. & Rob. 486. See the reporter's note there. See also *R. v. Christopher*, 1 Den. C. C. 536.

(y) *Venafra v. Johnson*, 1 M. & Rob. 316. See *Rowland v. Ashby*, R. & M. N. P. C. 231; *R. v. Harris*, R. & M. 338, *ante*, p. 546, and *R. v. Reed*, M. & M. 403.

(z) *R. v. Curtis*, 2 C. & K. 763. But see *contra*, *R. v. Thornton*, Warwick Sum. Ass. 1817. *Holroyd, J. R. v. Wylde*, 6 C. & P. 380. See *R. v. Edmunds*, 6 C. & P. 164, *ante*, p. 525. With reference to cases where the magistrate has not taken the evidence of a witness in writing, Mr. Phillpotts observes, 'If the magistrate has not taken in writing the information of a witness, it is clear that no proof can be admitted after his death of what he said before the magistrate; or if the magistrate took the information in writing

but irregularly, as, for instance, if the witness was not sworn, or the magistrate did not subscribe, it is equally clear that after the witness's death parol evidence of his information will not be admissible; for such evidence would not have been admissible except by virtue of the statute, nor is it admissible since the passing of the statute, the statutory regulations not having been complied with; the written information is the primary and best proof of the information, and the irregularity of that primary evidence is not a sufficient ground for receiving evidence of a secondary or inferior nature.' In this passage (which does not appear in the 7th edition), the observations must be taken to apply to 'an examination taken in the presence of the prisoner;' and taking them so to apply, it may admit of consider-



*(h) Depositions before Coroners.*

By the Coroner's Act, 1887 (50 & 51 Vict. c. 71), sec. 4, (1) 'The coroner and jury shall at the first sitting of the inquest view the body, and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts whom he thinks it expedient to examine.

(2) 'It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material; and any such deposition shall be signed by the witness, and also by the coroner.'

By sec. 5 (3), 'The coroner shall deliver the inquisition deposition and recognisances, with a certificate under his hand that the same have been taken before him, to the proper officer of the Court in which the trial is to be, before or at the opening of the Court.' (a)

There are conflicting authorities upon the question whether a deposition before a coroner is receivable in evidence on the trial of a prisoner who was not present when the witness was examined. (b)

Smith, J., refused to admit in evidence the deposition of a witness

able doubt whether they are well founded. The deposition of a witness is not admissible because it is in writing under the statute, but because it is taken in the presence of the prisoner, and he has had an opportunity of cross-examining the witness; and it is conceived that at common law the rule is well established, that the testimony of a deceased witness, who has been examined upon oath on a former occasion in a proceeding between the same parties, on the same subject-matter, is admissible in a subsequent proceeding between the same parties, and may be proved by any one who heard the evidence given. And this rule extends to criminal as well as civil proceedings. See *ante*, p. 388. Now in all criminal prosecutions the Queen is considered as the prosecutrix, both before the magistrate and on the trial. The parties, therefore, before the magistrate and on the trial are the same, and consequently the evidence of a deceased witness examined in the presence of the prisoner before the magistrate might, at common law, be proved by parol on the trial of the prisoner. But the statute having required the magistrate to put the evidence in writing, such writing is the best evidence of what the witness said. It is submitted, however, that in case no part of the evidence were taken down, parol evidence would be admissible of what the witness said. The statute has directed the examination of a prisoner to be taken in writing, and yet if that be not done, parol evidence is admissible, because such parol evidence was admissible at common law.

Lambe's case, 2 Leach, 552. The observations of the judges in this case furnish a strong argument by analogy in support of the view here contended for. It might be further contended that what was said by a witness in the presence of a prisoner before a magistrate was admissible at common law, as a statement made in the prisoner's presence, to which he not only might reply, but which he was called upon expressly to answer. See *R. v. Edmunds*, 6 C. & P. 164, where Tindal, C. J., admitted evidence of what a deceased prosecutor swore in the presence of the prisoner on an examination before a magistrate for committing the assault, from the effects of which the deceased died, 'as producing an answer, and like any other conversation.' And see the observations of Parke, B., in *Melen v. Andrews*, *ante*, p. 524. C. S. G.

(a) Sec. 5 (1) gives the coroner power where the inquisition charges a person with murder or manslaughter to issue a warrant for his arrest, and to bind by recognisance all material witnesses examined before him to appear and give evidence at the next court of oyer and terminer or gaol delivery. Sec. 5 (2) empowers the coroner to give bail.

(b) Lord Morley's case, Kel. 55. Thatcher's case, Sir T. Jones, 53. Bromwich's case, 1 Lev. 180. Gilb. Ev. 124. *R. v. Stockley*, 1 East, P. C. c. 5, s. 78. Bull. N. P. 242. See per Alderson, B. *R. v. Austin*, Dears. C. C. 612. 3 T. R. 722. *Garrett v. Ferrand*, 6 B. & C. 611. *Sitts v. Brown*, 9 C. & P. 601. 1 & 2 Ph. & Mary, c. 13, s. 5.

taken before the coroner where the prisoner was not present at the inquest when the witness was examined. (c) The objection to the admission of a deposition taken by a coroner in the absence of a prisoner is fortified by the 11 & 12 Vict. c. 42, s. 17, expressly requiring the deposition before a magistrate to be taken in the presence of the prisoner, and giving him a full right of cross-examination.

A marked distinction exists between the situation in which a prisoner stands when he is before a magistrate on a charge of felony or misdemeanor, and when he is present during the time a coroner is holding an inquest; and this distinction seems to have been acted upon in the following case. Upon an indictment for murder it was proved that a witness who had been examined before the coroner was insane at the time of the trial, and had been so for some time previously; part of his deposition had been taken in the absence of the prisoner, and part in his presence, but the whole was read over in his presence; and it was proposed to give this deposition in evidence, and 1 *Phill. Ev.* 369, 373, referred to, in order to shew that the deposition was admissible where the witness had become insane; and *R. v. Smith*, (d) to shew that reading the whole over in the presence of the prisoner rendered it admissible. J. A. Park, J., 'There is one positive objection, that the witness might be insane when he was examined before the coroner. Secondly, the 7 Geo. 4, c. 64 (e) makes a strong distinction between magistrates and coroners. There is a charge made before a magistrate; but I cannot call it a charge before a coroner. In *R. v. Smith*, the deposition was taken in a common felony, and there the question was, whether a deposition taken on one charge could be evidence on another. I will not receive this deposition. I think it safer not to do so.' (f)

(i) *Where Witness Examined before Trial.*

By 30 & 31 Vict. c. 35, s. 6, 'And whereas by the 11 & 12 Vict. c. 42, s. 17, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act, of a witness who is dead, or so ill as to be unable to travel. And whereas it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the

(c) *R. v. Rigge*, 4 F. & F. 1085. This it is submitted was a correct decision. See 1 *Taylor, Ev.* 459, 4th edit. 2 *Stark. Ev.* 385. 2 *Phill. Ev.* 75.

(d) *Ante*, p. 564.

(e) Repealed by 50 & 51 Vict. c. 71, so far as it relates to coroners.

(f) *R. v. Charles Wall*, Worcester Sum. Ass. 1830, MSS. C. S. G. The distinction taken by the learned judge seems to deserve much consideration. The ground on which a deposition before a magistrate is admissible is that the prisoner, being there to

answer a charge, has the right to cross-examine the witnesses. In many cases before coroners, even if the prisoner be present, there is no charge, and perhaps no suspicion, against him, and it may be doubted whether in strictness under any circumstances he has a right to cross-examine the witnesses; and if there were no charge in fact made against him, his interference would be an unwarranted interruption of the proceedings. See the observations of Parke, B., in *Melen v. Andrews*, *ante*, p. 524. C. S. G.

said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interest of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: Therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the Court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough, in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the Court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.'

By sec. 7, 'whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner shall have been conveyed.'

Under the above sections, 'the notice of intention to take such statement' must be in writing, and an oral notice is insufficient, although the prisoner is proved to have been present at the time when the statement was taken. (g)

An order for the examination of a witness resident in England, but unable from illness to attend the trial, cannot be made by the Court of Queen's Bench in a criminal prosecution, either by the common law authority of the Court, or under the 1 Will. 4, c. 22. (h)

The Court, upon application of the defendant, postponed the trial of an information for a misdemeanor, upon the defendant's consenting by writing under his own hand to the examination upon interrogatories of a witness for the Crown. (i)

(j) *Offences committed Abroad—Merchant Shipping Act.*

Where an indictment or information is exhibited in the Queen's Bench for an offence committed in India, the depositions of the witnesses may be obtained under the provisions of the 13 Geo. 3, c. 63, s. 40 and s. 44. This statute enacts that the Court may award a writ of mandamus to the judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the Court, upon oath administered according to the form of their several religions; and these depositions duly taken and returned, in the form prescribed by the Act, are to be allowed, and deemed as good and competent evidence, as if the witnesses had been sworn at the trial, and examined *vivâ voce*. (j)

In the case of a prosecution for an offence committed abroad by any person employed in the public service, the depositions of witnesses resident abroad may be obtained in the way pointed out by the 42 Geo. 3, c. 85.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 684, 'For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.'

By sec. 691, 'whenever in the course of any legal proceedings instituted in any part of Her Majesty's dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of the proceeding, then upon due proof, if the proceeding is instituted in the United Kingdom, that the witness cannot be found in that kingdom, (k) or if in

(g) *R. v. Sharmer*, 17 Q. B. D. 323.

(h) *R. v. Upton St. Leonard's*, 10 Q. B. 827, and see *R. v. Lady Briscoe*, 1 Dowl. 520.

(i) *R. v. Morphew*, 2 M. & S. 602. See *Anon.* 2 Chit. 199.

(j) See *R. v. Douglas*, 1 C. & K. 670. *Lord Denman*, C. J.

(k) Witnesses, whose evidence had been taken abroad by the British Vice Consul under s. 270 of 17 & 18 Vict. c. 104, which was in similar terms, were officers of a British sailing vessel, which traded between Fayal and Boston, and which was stated by an officer of the board of trade, from examination of official records, never to

any British possession, that he cannot be found in that possession, any deposition that the witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in Her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence; provided that

- (1.) If the deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom:
- (2.) If the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession :
- (3.) If the proceeding is criminal it shall not be admissible unless it was made in the presence of the person accused :

a deposition so made shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom it is made; and the judge, magistrate, or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof. It shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding a certificate under this section shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified. Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or Ordinance of the Legislature of any colony, so far as regards that colony, or interfere with the power of any colonial legislature to make those depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible.

The prisoner was indicted for larceny alleged to have been committed in February 1852, on board an English merchant vessel, lying in the Bosphorus, of which the prisoner was mate and the prosecutor captain. The principal evidence against the prisoner consisted of the depositions of witnesses still abroad; and the captain proved that he made a charge against the prisoner of stealing his property before the British Consul at Constantinople. Each witness was sworn and examined by the Consul. Each witness was asked if he could speak English, and if he could not he was sworn in another language; some were sworn in Greek, which the captain did not understand. They were all sworn on the same book, which was an English bible. The captain did not know the religion of any of the witnesses sworn in the foreign language. The Consul himself took the examinations, and translated each question and answer as it was given, and wrote the depositions in English; and when the whole of each deposition was taken down it was read

have been in this country, held that it was sufficiently proved that the witnesses were not in the United Kingdom, and the depositions were accordingly admitted in evidence.

*R. v. Conning*, 11 Cox, C. C. 134. *R. v. Anderson*, 11 Cox, C. C. 154. *R. v. Stewart*, 13 Cox, C. C. 296.

to the prisoner, and he was asked what he had to say; and all he said was that he was not guilty. The captain could not be answerable whether the prisoner was asked whether he would ask any witness any question. He could not ask questions of the witnesses, because he did not understand the language, and he did not tell the Consul anything he wished to be asked of the witnesses. The depositions had been transmitted to the Board of Trade by the Consul, and by that Board to the attorney for the prosecution, who produced them, and the captain proved his signature to his information and examination, which were amongst the depositions. The depositions bore the official seal of the English Consul for Constantinople, and were certified to have been taken in the presence of the prisoner. It was objected, 1, that there was no proof that the witnesses were duly sworn; 2, that there ought to have been an interpreter sworn, and that the Consul could not act as interpreter as he had done, or the depositions ought to have been returned in the language of the witnesses; 3, that the depositions, not being in the language of the witnesses, were not in fact their depositions; 4, that the prisoner was not proved to have had a fair opportunity of cross-examination. For the Crown it was contended that the Merchant Shipping Act, 7 & 8 Vict. c. 112, s. 59, made depositions taken before a Consul abroad and certified under his official seal to be the depositions, and that they were taken in the presence of the accused, admissible in courts of criminal jurisdiction, 'in like manner as depositions taken before any justice of the peace in England,' (l) and that by the Mercantile Marine Act, 13 & 14 Vict. c. 93, s. 115, depositions of any witnesses taken before any consular officer, in any criminal proceeding in the presence of the accused, and certified under his official seal to have been so taken, shall be admissible; and 'any deposition purporting to be so certified shall be deemed to have been so taken and certified as aforesaid, unless the contrary is proved.' (m) That the deposition so certified is the deposition as it stands on the face of the documents. The 7 & 8 Vict. c. 113, s. 1, was also cited. It was replied that the 13 & 14 Vict. c. 93, s. 115, was answered, because it was proved that the depositions were not properly taken; and that the 7 & 8 Vict. c. 112, s. 59, only made the depositions receivable where they would have been receivable if taken in England, and that these depositions would not have been so receivable. Greaves, Q. C., consulted Wightman, J., and they agreed that the proper course would be to admit the depositions, but to reserve the points. The depositions were then put in; but on examination they were found to contain a great deal of hearsay evidence. It was then objected that they were inadmissible on this ground; as it was impossible to separate the good and bad evidence, and the statute had made the depositions evidence, and there was no power to strike out any part of them. Greaves, Q. C., was of opinion that he might run his pen through all the objectionable parts of the depositions, (n) and direct the officer to read the remainder. (o)

(l) This Act is repealed by the 17 & 18 Vict. c. 120.

(m) This Act also is repealed by the 17 & 18 Vict. c. 120.

(n) See *Small v. Nairne*, 13 Q. B. 840. *Hutchinson v. Bernard*, 2 M. & Rob. 1. *Steinkeller v. Newton*, 9 C. & P. 313.

(o) *R. v. Russell*, MSS. C. S. G., S. C.

6 Cox, C. C. 60. On attempting to strike out the objectionable parts, it appeared so clear that the depositions had been taken by a person very little conversant with law, that Greaves, Q. C., told the counsel for the prosecution that it was very difficult to presume that such a person had properly administered the oath or given the prisoner a proper opportunity of cross-examination ;

and, thereupon, the prosecution was abandoned. Wightman, J., thought that as the witnesses had taken the oath without objection, it might perhaps be presumed that they were properly sworn ; but on the other points he entertained grave doubts. Greaves, Q. C., was strongly inclined to think that all the objections were good.

## CHAPTER THE FIFTH.

OF WITNESSES. — WHAT FACTS WITNESSES MAY DISCLOSE, AND WHAT ARE PRIVILEGED COMMUNICATIONS, p. 578. — HOW WITNESSES ARE TO BE EXAMINED, p. 597. — HOW THE CREDIT OF WITNESSES MAY BE IMPEACHED, p. 612. — HOW MANY WITNESSES ARE SUFFICIENT, p. 636. — HOW THE ATTENDANCE OF WITNESSES IS TO BE COMPELLED AND REMUNERATED, p. 636. — OF ACCOMPLICES, p. 642. — AND WHAT WITNESSES ARE COMPETENT TO GIVE EVIDENCE, p. 653.

### SEC. I.

#### *Of Privileged Communications, and other Matters which a Witness may not Disclose.*

A WITNESS is to be sworn to speak the truth, the whole truth, and nothing but the truth. But this form of oath, absolute as it seems, must be taken with an implied reservation, that the witness is not to disclose any facts within his knowledge, which, by the law of the land, founded on considerations of justice, and of public policy, he is forbidden to make known. Of such a nature are professional communications between a client and his solicitor, or counsel, and matters connected with the government of the country. (a)

The law attaches so sacred an inviolability to communications between a client and his legal advisers, that it will neither oblige nor suffer persons so employed to reveal any facts confidentially disclosed to them at any period of time, neither after their employment has ceased by dismissal or otherwise, nor after the cause in which they were engaged is entirely concluded. (b) The privilege of not being examined on such subjects is the privilege of the client, and not of the solicitor or counsel; (c) and it never ceases. 'It is not sufficient,' said Buller, J., (d) 'to say that the cause is at

(a) See *Spark v. Middleton*, 12 Vin. Abr. Ev. B. a. 4, p. 38, 1 Keb. 505.

(b) Lord Say and Seale's case, 10 Mod. 41. *Wilson v. Rastall*, 4 Term Rep. 753, in the judgment of Buller, J. *Sloman v. Herne*, 2 Esp. N. P. C. 695. *R. v. Withers*, 2 Campb. 578. *Parkhurst v. Lowten*, 2 Swanst. 194, 221. *Richards v. Jackson*, 18 Ves. 474.

(c) 10 Mod. 41. Bull. N. P. 284. But if the client waive his privilege, the witness may be examined. *Merle v. More*, R. & M. N. P. C. 390. But he is not considered as waiving it by calling his solicitor as a witness. 1 Phill. Ev. 163, citing *Waldron v.*

*Ward*, Styl. 449. *Vaillant v. Dodemead*, 2 Atk. 524.

(d) 4 T. R. 759. 'The first duty of a solicitor is to keep the secrets of his clients,' per Gaselee, J. *Taylor v. Blacklow*, 3 B. N. C. 235. He ought, therefore, 'to consider his lips sealed with a sacred silence' as to all confidential communications, per Tindal, C. J., *ibid.* And see *Petrie's case* and *Madam du Barré's case*, cited 5 T. R. 756. A solicitor, therefore, who without his client's consent discloses a confidential communication, is 'guilty of a gross breach of a great moral duty,' per Vaughan, J., *Taylor v. Blacklow*, and is liable to an action



an end; the mouth of such a person is shut for ever.' And it makes no difference that the client is not in any shape party to the cause before the Court. (e)

The privilege is strictly confined to communications made to counsel, solicitors, and attorneys. (f) No others, however confidential, or whatever be the relation or employment of the party entrusted, are privileged. Therefore all other professional persons, whether physicians, surgeons, or clergymen, are bound to disclose the matters confided to them. (g) Thus where the prisoner, being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted, that confession was permitted by Buller, J., to be given in evidence on the trial, and the prisoner was convicted and executed. (h) So a confession to a Popish priest has been held not to be privileged. (i) So a

for any injury that may arise from such disclosure. Ibid. Or he may be punished by the court to which he belongs, admitted *arguendo*. Ibid. Two learned barons, however, in *Hibberd v. Knight*, 2 Ex. R. 11, expressed an opinion that if an attorney chose *voluntarily* to disclose a confidential communication, the Court would receive the evidence. These observations were merely *obiter dicta*, and seem to have arisen from an erroneous impression of the facts in *Marston v. Downes*, 6 C. & P. 381. 1 A. & E. 31. The former of these reports correctly states what occurred on the trial, and certainly the attorney did not volunteer any statement of the contents of any deed; and upon the observations in *Hibberd v. Knight* being cited in *Newton v. Chaplin*, 10 C. B. 356, Maule, J., said, 'I presume that the learned barons did not mean that the attorney may in all cases betray his own client.' The matter, however, seems to be set at rest by *Cleave v. Jones*, 7 Exch. 421, as it was there held that an attorney could not give in evidence on his own behalf a confidential communication in an action against his client. In *Volant v. Soyer*, 13 C. B. 231, Jervis, C. J., raised a doubt whether the 14 & 15 Vict. c. 99, had not taken away the ground of objecting to the production of a document on the ground of its having been received professionally; but Maule, J., said that 'The right, which a client has always enjoyed, of being protected from a breach of professional confidence, remains the same. I think the protection still continues unimpaired, so far as regards the prohibition to the attorney to give evidence of the contents of, or to produce documents belonging to, his client.'

(e) *R. v. Withers*, 2 Campb. 578.

(f) 4 T. R. 758. *R. v. Duchess of Kingston*, 11 St. Tr. 246. <sup>1</sup>

(g) Ibid.

(h) *R. v. Sparkes*, cited in *Du Barré v.*

*Livette*, Peake R. 78, in which latter case Lord Kenyon said he should have paused before he admitted such evidence. But the point, that confessions to clergymen are not privileged, has been fully established by the decision in *R. v. Gilham*, *ante*, p. 493. In *Broad v. Pitt*, 3 C. & P. 518, Best, C. J., after recognising this decision, said, 'I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them I shall receive them in evidence.' In *R. v. Griffin*, 6 Cox, C. C. 219, the chaplain of a workhouse was called to prove certain conversations he had had with the prisoner as to injuries she had inflicted on her child, for whose murder she was being tried, when he visited her as her spiritual adviser; Alderson, B., 'I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because, without an unfettered means of communication, the client would not have any proper legal means of assistance. The same principle applies to a person, deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given.' No case was cited.

(i) *Butler v. Moore*, M'Nall. Ev. 253, as cited 1 Phill. Ev. 165. In *R. v. Hay*, 2 F. & F. 4, Hill, J., committed a Roman Catholic priest for refusing to state from whom he received a stolen watch, which he stated he had received in connection with the confessional. But the priest was not asked to disclose anything that had been stated to him in the confessional, and therefore no question arose as to that. Where a witness had taken an oath to a prisoner that he would not reveal what the prisoner should tell him, Patteson J., said, 'These oaths are very wrong and wicked, but still

#### AMERICAN NOTE.

<sup>1</sup> In America a confession to a Roman Catholic priest is privileged but not one made to a Protestant clergyman. *Smith's*

case, 2 *Roger's Record*, 77. *Simons v. Gratz*, 1 Penn. Rep. 417. *C. v. Drake*, 15 Mass. 161.

banker, (j) steward, servant, or private friend, is bound to disclose a communication, however confidential. (k) And where a clerk to the commissioners of the property-tax was required to prove the defendant to be a collector, and he objected, because he had taken an oath of office not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an Act of Parliament, it was held that he was bound to give his testimony, and that the evidence which a witness was called upon to give in a court of justice was to be considered as an implied exception in the Act. (l) An arbitrator may be called to prove what matters were claimed before him on a reference: (m) he cannot, however, be admitted or called on to give evidence of any concessions made by one party during the reference for making his peace and getting rid of the suit, although, as to regular admissions by the parties, there is no objection to his testimony. (n) A person who acts as an interpreter, (o) or agent, (p) between the solicitor and his client, or the solicitor's clerk, (q) cannot be called on to reveal a confidential communication; for they stand precisely in the same situation as the solicitor himself, and are considered as his organs.

It has been held that a person who is consulted confidentially on the supposition of his being a solicitor, when in fact he is not one, is compellable to answer. (r) And propositions which the solicitor of one party has been professionally entrusted to make to another party may be proved by another witness who was present when they were delivered. (s) And a solicitor may be called upon by a plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as solicitor for the defendant. (t) So where the plaintiff and defendant went together to the plaintiff's attorney's office, and had a conversation in the presence of the attorney's clerk, it was held that this conversation was not a privileged communication, but might be proved by the clerk, and that a letter written by the clerk in consequence of instructions given by the defendant in the course of that interview was admissible, as that was an act done. (u) So where an

they are not binding, and every person, except counsel and attorneys, is compellable to reveal what they may have heard; and counsel and attorneys are only excepted because it is absolutely necessary, for the sake of their clients, that communications to them should be protected; and admitted the confession. *R. v. Shaw*, 6 C. & P. 372.

(j) *Lloyd v. Freshfield*, 2 C. & P. 329.

(k) *Vaillant v. Dodemead*, 2 Atk. 524. *Lord Falmouth v. Moss*, 11 Price, 455.

(l) *Lee v. Birrell*, 3 Campb. 337.

(m) *Martin v. Thornton*, 4 Esp. 181, by Lord Alvanley. *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; 41 L. J. Ex. 137.

(n) *Slack v. Buchannan*, Peake N. P. C. 6. *Westlake v. Collard*, Bull. N. P. 236. *Martin v. Thornton*, 4 Esp. 181. Bull. N. P. 284.

(o) *Du Barrè v. Livette*, Peake N. P. C. 78, S. C. 4 T. R. 756.

(p) *Parkins v. Hawkshaw*, 2 Stark. 239.

(q) *Taylor v. Forster*, 2 C. & P. 195. See *Webb v. Smith*, 1 C. & P. 337.

(r) *Fountain v. Young*, 6 Esp. 113; *sed quere*, whether this would be so where the client has acted *bona fide* and without negligence.

(s) *Gainsford v. Grammar*, 2 Campb. 10.

(t) *Griffith v. Davies*, 5 B. & Ad. 502. And per Parke, J., 'This is not a confidential disclosure, but an open communication from one adversary to another, witnessed by the attorney of one party. In *Gainsford v. Grammar*, the Lord Chief Justice might properly reject the attorney's evidence of what his client said to him, but not his statement of what he himself afterwards said to the opposite party.'

(u) *Shore v. Bedford*, 5 M. & G. 271.

act is done in pursuance of a bargain between two parties and in the presence of the solicitors of each of them, the communication made by one party to his solicitor, relating to that act in the presence of the other party and his solicitor is not privileged. The defendant, in the presence of his solicitor, and one Clark and his solicitor, Vallance, signed a note, and it was held that Vallance might prove that the note was given by the defendant to Clark in consideration of his withdrawing all opposition to the defendant's passing his last examination as a bankrupt. (*w*) And communications made to a person, by profession a solicitor, but not employed as such in the particular business which is the subject of inquiry, are not privileged, though they may have been made confidentially. (*x*)

Where two parties employ the same solicitor, a communication by one to him in his common capacity is not privileged, but may be used by the other. (*y*) And where a party employs a solicitor who is also employed by the other side, the privilege is confined to such communications as are clearly made to him in the character of his own solicitor. (*z*)

It now remains to be considered what sort of communications made to a solicitor or counsel by his client are entitled to protection. A very eminent writer on the Law of Evidence (*a*) has laid it down, that the privilege of the client is not confined to cases only where he has employed the solicitor in a suit or cause, but extends to all such communications as are made by him to the solicitor in his professional character and with reference to professional business. And this opinion has been confirmed by a case (*b*) where it was held that an attorney, to whom an application had been made to draw an assignment of goods, which he declined to do, could not be allowed to disclose that circumstance, a question having arisen whether an assignment subsequently drawn by another attorney, was fraudulent. And in that case Richardson, J., said, that if an attorney were to be consulted on the title to an estate, he would not be at liberty to dis-

(*w*) *Weeks v. Argent*, 16 M. & W. 817.

(*x*) *Wilson v. Rastall*, 4 T. R. 753, 760, and see *post*, p. 591. In a trial at Nisi Prius at Westminster, an attorney who had drawn an agreement between a sheriff and his under-sheriff, being produced to prove a corrupt agreement between them, was not compelled to discover the matter, and per Holt, C. J., it seems to be the same law of a scrivener; and he cited a case where upon a covenant to convey as counsel shall advise, *et consilium non dedit advisamentum* being pleaded, conveyances made by the advice of a scrivener being tendered and refused, was allowed to be good evidence upon this issue; for he is a counsel to a man with whom he will advise, if he be instructed and educated in the way of practice, otherwise of a gentleman, parson, &c., *Anonymous*, Skinn. 404. And in *Turquand v. Knight*, 2 M. & W. 98, it appeared that Knight had applied to an attorney to procure him a loan of money, and it was contended that where an attorney was employed to raise money, that was not such an employment as brought him within the rule; and

that here he was acting as a scrivener only. Lord Abinger, C. B., said, 'As to the point of this document being brought to him in the character of a scrivener, Lord Nottingham laid it down that he would not compel a scrivener to disclose the communications made to him.' *Harvey v. Clayton*, 2 Swanst. 221 n.

(*y*) *Baugh v. Cradocke*, 1 M. & Rob. 182, *Patteson, J. Cleve v. Powell*, 1 M. & Rob. 228, Lord Denman, C. J., saying, 'either party has a right to the disclosure.'

(*z*) *Perry v. Smith*, 9 M. & W. 681, per Parke, B.; in which case it was held that the same attorney having been employed upon the sale of an estate by the vendor and purchaser, a communication from the purchaser to the attorney, asking him for time to pay the purchase money, was not privileged. See *Griffith v. Davies*, per Parke, J., *supra*, note (t).

(*a*) Phill. Ev. 7th edit. 143.

(*b*) *Cromack v. Henthrope*, 2 B. & B. 4. But see *R. v. Cox & Railton*, 14 Q. B. D. 153, *post*, p. 592.

close any information thus communicated to him to the prejudice of his client. And Sir J. Leach, V. C. in *Walker v. Wildman*, (c) considered the protection to extend to every communication made by the client to his counsel or attorney or solicitor for professional purposes. (d) And although Lord Tenterden, C. J., on several occasions, both before and since the case of *Cromack v. Heathcote*, expressed at Nisi Prius a contrary opinion, (e) yet it is now clearly settled that the privilege of professional confidence is not limited to cases in which a suit is in contemplation, (f) but that the client's privilege extends much beyond communications in respect of a suit. (g) Thus, where it was proposed to ask an attorney whether a person had not applied to him to draw a conveyance, Parke, J., refused to allow the question to be asked, saying, 'I am of opinion that the privilege applies to all cases where the client applies to the attorney in his professional capacity, and an application to draw a deed is, I think, of that description.' (h)

In one case, (i) Alderson, B., said, 'The rule seems to be correlative with that which governs the summary jurisdiction of the courts over attorneys. In *Ex parte Aitken*, (j) that rule is laid down thus: "Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." So where the communication made relates to a circumstance so connected with the employment as a solicitor, that the character formed the ground of the communication, it is privileged from disclosure.' Thus communications made in relation to the sale and purchase of estates are protected; a solic-

(c) 6 Madd. 47.

(d) And from the cases of *Brard v. Ackerman*, 5 Esp. 120, and *Robson v. Kemp*, 5 Esp. 52, it appears that Lord Ellenborough, C. J., was of the same opinion.

(e) *Wadsworth v. Hamshaw*, 2 Brod. & Bing. 5, note (a). *Manning's Dig.* 374. *Williams v. Mundie*, R. & M. N. P. C. 34.

(f) Phill. Ev. 168.

(g) The opinion of Lord Chancellor Brougham, Tindal, C. J., Lord Lyndhurst, C. B., and Parke, B., in *Greenough v. Gaskell*, Mylne & K. 98, as stated 4 B. & Ad. 876, per Parke, B. See *R. v. Cox & Railton*, 14 Q. B. D., 153, *post*, p. 592.

(h) *Doe d. Shellard v. Harris*, 5 C. & P. 592. The learned Baron also held in the same case that the attorney could not be asked whether the party had asked his advice for a lawful or for an unlawful purpose, saying, 'there is a great deal of difficulty in the witness's disclosing whether the conference between him and his client was for a lawful or unlawful purpose, without one being told what it was. It might be that the party asked if a particular thing could legally be done.' The learned Baron also said, that *Williams v. Mundie* was overruled

by *Greenough v. Gaskell*. In *Bowman v. Norton*, 5 C. & P. 177, Tindal, C. J., held that a conversation between a client, who afterwards became bankrupt, and his attorney's clerk, on the subject of his affairs, was a privileged communication, and could not be given in evidence in an action by his assignees for the purpose of shewing his motives. It would seem that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused may have consulted his legal adviser not after the crime, for the legitimate purpose of being defended, but before the commission of the crime, for the purpose of being guided or helped in it. In the former case the communication would be privileged, in the latter it would not. The question whether the advice was asked before or after the commission of the offence, will not be always decisive as to the admissibility of such evidence. *R. v. Cox & Railton*, 14 Q. B. D., 153, *post*, p. 592.

(i) *Turquand v. Knight*, 2 M. & W. 98.

(j) 4 B. & Ald. 47. See also *Ex parte Yeatman*, 4 Dowl. P. R. 304.

itor, therefore, who has been employed in the purchase and sale of estates, cannot be asked as to a communication made to him by the party who employed him. (*k*) So a solicitor who, being resorted to by a borrower to raise money for him, peruses on the part of the proposed lender the abstracts of the borrower, is not allowed to give evidence concerning them. (*l*) But where a treaty had been entered into by B. with E. for the exchange of lands, and an abstract was handed by the attorney of E. to the attorney of B., and he compared it with the title deeds, and the attorney of B. on being called upon to produce the abstract stated that his client claimed to be entitled to the property under the contract of exchange, and that he held the abstract as part of the evidence of the contract, and had not applied to his client for leave to produce the abstract, but was ready to do so, if the judge thought he ought, and the judge answered that there appeared no sufficient reason why he should not, it was held that the abstract was properly produced. (*m*)

A solicitor is not bound to produce, or to answer any questions concerning the nature or contents of, a deed or other instrument entrusted to him professionally by his client; and the judge has no right to look at the instrument to see if the objection to produce it or to disclose its contents be well founded or not; for the mere statement of the solicitor that he received the document from his client professionally is enough to protect it. (*n*) But where an attorney refused to produce a deed on the ground that it was one of his clients' title deeds, and his clients had instructed him not to produce it, the privilege was allowed; but the judge directed him to produce the deed and permit a witness to read the endorsement on it, but not the deed itself, for the purpose of identification; it was held that the judge did right, for the privilege is only not to produce the instrument for the purpose of disclosing its contents. (*o*)

A communication made to a solicitor, if confidential, is privileged in whatever form made; if it would be privileged when communicated in words spoken or written, it will be privileged equally when conveyed by means of sight instead of words. (*p*) Where, therefore, the attorney of a defendant, at the suggestion of his counsel in consultation, obtained a deed from the defendant, and in the presence of

(*k*) *Mynn v. Joliffe*, 1 M. & Rob. 326, Littledale, J.

(*l*) *Doe d. Peter v. Watkins*, 3 Bing. N. C. 421. And see *Taylor v. Blacklow*, 3 Bing. N. C. 235.

(*m*) *Doe d. Lord Egremont v. Langdon*, 12 Q. B. 711.

(*n*) *Volant v. Soyer*, 13 C. B. 231.

(*o*) *Phelps v. Prew*, 3 E. & B. 430. Coleridge, J., said that the process of identification might at times involve a disclosure of the contents of the instrument; and when it did it was objectionable. But in this case it did not involve any disclosure of the contents, and was like the case of disclosing a blot of red ink on the back of a deed.

(*p*) 1 Phill. Ev. 169, citing *Robson v. Kemp*, 5 Esp. R. 54, where it was held that an attorney could not give evidence as to the fact of the destruction of an instrument

which he had been admitted in confidence to see destroyed. In *Wheatley v. Williams*, 1 M. & W. 533, it was held that an attorney is not compellable to state, when examined as a witness, whether a document shewn to him by his client in the course of a professional interview was then in the same state as when produced on the trial, *e. g.*, whether it was then stamped or not; and per Lord Abinger, C. B., 'Suppose an attorney when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he would be bound to produce it? If, therefore, a document be exhibited to an attorney, in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication.'

his counsel, and for their information, ascertained its contents, it was held that he was not bound to state its contents. (q) So letters between a defendant and his country or town solicitors, and letters between his country and town solicitors, are privileged. (r)

A solicitor will not be allowed to produce a deed which has been deposited with him confidentially in his professional character; and if the deed has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus a copy of a deed which had been obtained from one who had formerly been entrusted with the original in his professional character as a solicitor, is not good secondary evidence against his client. (s) But this case has been doubted. (t) Where a vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared, and the attorney was paid for this business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft, which remained afterwards with the vendor's attorney; the Court of King's Bench held that such draft was confidentially deposited with the latter by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. (u) And even if a solicitor has on one occasion produced a deed entrusted to him by a client under the erroneous compulsion of one tribunal, he will not be bound to produce it before another tribunal. (v) So where an attorney, attending under a *subpœna duces tecum*, stated that he had a deed in his custody as attorney, but that his clients had instructed him not to produce the deed, which was one of their title deeds, and he, therefore, refused to produce it, it was held that he was not bound to produce it. (w) So where upon an indictment for perjury alleged to have been committed on the trial in a County Court with reference to the writing on a paper then produced, an attorney was called under a *subpœna duces tecum* to produce such paper; he had been attorney for the prisoner in the County Court, and had received this paper from the prisoner for the purpose of conducting the case in County Court as his attorney, and he claimed a lien on the paper for his costs; Coltman, J., held that the attorney's possession was the possession of the prisoner, and that he ought not to produce it. (x)

So on the prosecution for the forgery of a promissory note, an attorney who had acquired possession of the note in his professional character from the prisoner was not compelled or allowed to pro-

(q) *Davies v. Waters*, 9 M. & W. 608.

(r) *Reid v. Langlois*, 1 Mac. & Gord. 627. *Goodall v. Little*, 1 Sim. N. S. 155. And see *Penruddock v. Hammond*, 11 Beav. 59, *Blenkinsop v. Blenkinsop*, 10 Beav. 277, as to cases for counsel, &c. *Vent v. Pacey*, 4 Russ. 193.

(s) *Fisher v. Heming*, MS. 1 Phill. Ev. 170, *Bayley, J.* See also *Copeland v. Watts*, 1 Stark. N. P. C. 93.

(t) 'I have always doubted the correctness of that ruling. Where an attorney entrusted confidentially with a document, communicates the contents of it, or suffers another to take a copy, surely the secondary

evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?' per Parke, B., in *Lloyd v. Mostyn*, 10 M. & W. 478, where it was held that a copy examined with a bond, produced for the purpose of admission under a judge's order, was admissible, although the attorney who held the bond was not bound to produce it on the trial.

(u) *Doe d. Strode v. Seaton*, 2 A. & E. 171.

(v) *Nixon v. Mayoh*, 1 M. & Rob. 76.

(w) *Phelps v. Prew*, 3 E. & B. 431.

(x) *R. v. Hankins*, 2 C. & K. 823.

duce it, although subpoenaed so to do, and although he was not employed professionally for the prisoner at the trial, but was originally consulted about the note, for the purpose of suing the party upon it whose name was charged to be forged. (y) But this case has since been doubted. On an indictment for forging a will, a solicitor stated that he was applied to by the prisoner to act as his solicitor in raising some money; and that he was the solicitor of the prisoner in raising the money as well as of Williams in the advance of it; that the prisoner made an application to him; it was objected that this was a privileged communication, as the party was the solicitor for the prisoner; and the preceding case was relied upon. Patteson, J., 'I think that the case cited is not law, (z) and that the solicitor may be examined to shew what was the transaction between the parties, and what led to that transaction; but I will reserve the point for the consideration of the judges, if I should hereafter think it necessary to do so.' The witness then stated that the prisoner proposed to mortgage some land, which had been left him by his aunt, and that the prisoner told him the title deeds had been burnt, but that he gave him a paper which he said was his aunt's will. It was again objected that, as the will had been delivered to the witness by the prisoner while he was attorney for the prisoner, he ought not to produce it; Patteson, J., 'I think he is bound to do it.' The will was produced and read, and it was the will alleged to be forged. (a)

Upon an indictment for forging a will, it appeared that the wife of the prisoner, by his direction, took a will purporting to be the will of W. W. (not the will in question, but another forged will) to Mr. Cadle, a solicitor, and asked if he could advance her husband some money upon mortgage of property under the will of her father, W. W. She left the will with Mr. C., who afterwards returned it to her husband, and communicated to him what had passed with his wife. Mr. C., while the will was in his possession, had made an exact copy of the will, and the prisoner had had notice to produce it, and, not producing it, the copy was tendered in evidence. Mr. C. said, that at the time the will was produced to him he was not acting as attorney of the prisoner, and did not charge for the interview, but if he had been acting as his attorney

(y) *R. v. Smith*, *cor. Holroyd*, J., MS. 1 Phill. Ev. 171. In *Weeks v. Argent*, 16 M. & W. 817, Parke, B., said, 'All that *R. v. Smith* decides is that the possession of the attorney for the prisoner was the possession of the prisoner, so that if the prisoner did not suffer him to produce it, secondary evidence of it would have been admissible for the purposes of criminal justice.' See 24 & 25 Vict. c. 98, s. 46, noticed *post*, p. 587. And see *R. v. Cox and Railton*, 14 Q. B. D. 153, *post*, p. 592.

(z) In *R. v. Tylney and Tuffs*, 1 Den. C. 319, Patteson, J., said that this observation was too strong, and that *R. v. Smith* and *R. v. Avery* were distinguishable.

(a) *R. v. Avery*, 8 C. & P. 596. The indictment charged the intent to be to defraud Williams and the attorney in different counts. The prisoner was convicted, but no sentence passed on the indictment for for-

gery, the prisoner being sentenced on an indictment charging the transaction as a false pretence. Mr. Phillippa, vol. i. p. 171, observes that 'the distinction between this case and *R. v. Smith* is obvious. In *R. v. Avery*, the prisoner deposited the instrument in the hands of his solicitor, not with reference to a suit, nor with reference to any transaction resting solely between themselves, but for the purpose of a money transaction between himself and a third person, and to be disclosed and communicated to that person. In the case of *R. v. Smith*, on the contrary, the instrument was deposited with the solicitor for the purpose of a suit in which he consulted him professionally as a matter in confidence between him and his solicitor, and solely for his own interest. The two cases, therefore, are not inconsistent, and the one does not overrule the other.'

he should have made a charge; if he had found the security sufficient, he should have advanced the money; he was in no other way acting as the prisoner's solicitor. It was objected that the interview with the prisoner's wife was confidential, and that the conversation, which then took place, and the copy of the will, were not admissible; but the evidence was admitted. And, upon a case reserved, the judges held that the communication was not privileged. (b)

The prisoners were convicted of uttering a forged will. One of them having possessed himself of some title deeds from the house of the deceased, placed the forged will in the midst of them, and sent them to his attorney for the ostensible purpose of asking his advice upon the title deeds; but as Pollock, C. B., clearly thought, in order that the attorney might find the will among them, and act upon it, which he did by producing it on various occasions in the presence of such prisoner. It was afterwards produced before the magistrates at the preliminary investigation, and returned to the attorney. He was called upon the trial, and required to produce the will, which he did without objection, and handed it to the officer of the court. It was objected that it was a privileged communication, and ought not to be read; but Pollock, C. B., overruled the objection, and, upon a case reserved, the judges thought that the will was not put into the attorney's hands in professional confidence, and that the rule as to privileged communications between attorney and client did not apply. (c)

So where on an indictment for forging the will of W. Tuffs, an attorney, who had possession of the will, stated that the prisoner had consulted him, on a previous occasion, about some professional matters, on which he had advised her, though he had never made any charge for that advice, and that she afterwards brought a paper (the forged will) with her, and he judged from what she said that she came to consult him as to that document; that it was for the purpose of enforcing that document: he said further, 'she did not come to consult me as to what her rights were, but that I might enforce her rights under it.' It was objected on behalf of the prisoner that the attorney could not be allowed to produce the document; but Coltman, J., considered the effect of the attorney's evidence to be, that the document was committed to him, not to be kept as a confidential deposit, but in order that it might be exhibited in court for the purpose of enforcing her rights, and thought it, under the circumstances, advisable to receive the document in evidence with a view of obtaining the opinion of the judges on the point; which was reserved, but no opinion was given upon it, as the case went off on another point. (d)

(b) *R. v. Farley*, 1 Den. C. C. 197, 2 C. & K. 313. Pollock, C. B., in the course of the argument, asked, 'Do you mean that a man may always apply to an attorney to discount a forged bill with impunity?'

(c) *R. v. Hayward*, 2 C. & K. 234. S. C., as *R. v. Jones*, 1 Den. C. C. 166.

(d) *R. v. Tynley and Tuffs*, 1 Den. C. C. 319. See *ante*, vol. ii. p. 632. Parke, B., observed, 'the expression "for the purpose

of enforcing the document" seems ambiguous. Suppose it was delivered to the attorney for the express purpose of shewing that the tenant in possession might give up the possession to the forger of the will? Supposing, on the other hand, a man gives his title deeds to an attorney to enable him to bring an action of ejectment, he ought not, perhaps, to shew them adversely to his client.' In the report of this case, 3 Cox,



Where on an indictment for forgery it appeared that the prisoner had charged one Brittain with forgery, and had employed an attorney to conduct that prosecution, who had been served with a *sub-pœna duces tecum* to produce certain documents in this prosecution, and who, being called as a witness, stated that the documents had come into his possession as attorney for the prosecution in *R. v. Brittain*, in which case he was retained by the prisoner as attorney for the prosecution. It was urged for the Crown that an attorney cannot refuse to produce documents deposited with him by a person charged with an offence in respect of such documents, otherwise justice might be defeated. Were the privilege here sought to be established granted, conviction might be impossible, by reason of the non-production of the forged document; and Willes, J., held that the documents must be produced. (e)

The preceding case occurred after the passing of the 24 & 25 Vict. c. 98, s. 46, by which any justice may issue a warrant to search for any forged instrument whatsoever; and, though no reference is reported to have been made in that case to that clause, it may possibly have influenced the decision; for as a forged instrument may be seized under that clause, it is difficult to see how a solicitor can have such a possession of it as will privilege him from producing it. (f)

A very important question arises, where a solicitor has been employed for an illegal purpose, whether any communication in furtherance of such purpose can be considered as privileged; and the authorities appear to be very strong that no privilege exists in such cases. (g)

C. C. 160, Wilde, C. J., said, 'If title deeds are entrusted to an attorney as an attorney, can it be doubted that he is not at liberty to produce them?' Lord Denman, C. J., 'But if a forged and false instrument is given to an attorney, ought he not to take it to a magistrate?' Wilde, C. J., 'I apprehend the magistrate could not receive the statement.'

(e) *R. v. Brown*, 9 Cox, C. C. 281, May, 1862. The prisoner was undefended, no case was cited and the report does not state what the documents were.

(f) See the clause and the note to it, vol. ii. p. 682.

(g) In the great case of *Annesley v. The Earl of Anglesea*, 17 How. St. Tr. 1139, p. 1226, *et seq.*, it appeared that Giffard had been frequently employed as attorney for Lord Anglesea, but that for some time another firm had been his attorneys, and that on the 1st of May Annesley had shot a man, on whom an inquest was held on the 4th of May, and a verdict of murder found against Annesley, for which he was afterwards tried and acquitted (see *R. v. Annesley*, 18 How. St. Tr. 1094), and that on the 2nd of May Lord Anglesea had sent for Giffard, and directed him to collect evidence, and to carry on the prosecution, and to follow the directions of the other attorneys, who had advised him not to appear in the prosecution for fear of its hurting him in

the cause which was coming on between him and Annesley; and that Lord Anglesea, either then or afterwards, but it does not clearly appear when, told Giffard that he did not care if it cost him £10,000 if he could get Annesley hanged, for then he should be easy in his title and estates, and he understood that it was his resolution to destroy him if he could. It was supposed at the time that Annesley intended to sue for the title and estates of Lord Anglesea, and this was to prevent it. Giffard conducted the prosecution. The question was, whether the statement as to the £10,000 was privileged; for Annesley it was contended that it was not. Sergt. Tisdall said, 'If he is employed as an attorney in any unlawful and wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one, which lies on every member of society to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare. For this reason I apprehend that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client: but in this case the witness was not attorney to Lord Anglesea in any case relative to his testimony.' The court held.

In the case of *R. v. Dixon*, (*h*) it was held by Lord Mansfield and the rest of the court, that an attorney, who had been served with a *subpœna duces tecum* out of the Crown Office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon before a Master in Chancery, and which subpœna had been served on the attorney in order to found a prosecution for forgery against his client, was not bound to produce these required vouchers. (*i*) And the attorney-general, if questioned as to the reasons for filing an *ex officio* information, may refuse to answer. (*j*)

that the statement was not privileged, and seem to have adopted the view urged by counsel. Bowes, C. B., said, 'As this was in part a wicked secret, it ought not to have been concealed; though, if earlier disclosed, it might have been more for the credit of the witness.' Mounteney, B., after repeating the statement, said, 'Let us consider the doctrine, that such a declaration made by any person to his attorney ought not by that attorney to be proved. A man (without any natural call to it) promotes a prosecution against another for a capital offence — he is determined at all events to get him hanged — he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have mentioned (the meaning and intention of which, if the attorney has common understanding about him, it is impossible he should mistake) — he happens to be too honest a man to engage in such an affair — he declines the prosecution — but he must never discover this declaration because he was retained as attorney. The prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret; at last he finds an attorney wicked enough to carry this iniquitous scheme into execution, and after all none of these persons are to be admitted to prove this in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely against both.' In *Russell v. Jackson*, 9 Hare, 387, an attorney had been instructed to prepare a will by a testator to leave his property for the purpose of establishing a school for the education of children in the doctrines of socialism, and the attorney intimated doubts whether the law would permit such a disposition, and the testator then said that his two devisees knew his intentions, and, having confidence in them, he would leave his property to them, being satisfied that they would carry out his intentions; and the question was whether these instructions were privileged; and it was held that they were not; and Turner, V. C., said, 'Can it then be said that the communication should be protected, because it may lead to the disclosure of an illegal purpose? I think that it cannot; and that evidence which would otherwise be admissible cannot be rejected on such a ground. On the con-

trary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is party to a fraud, no privilege attaches to the communications with him on the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law.' In Equity any person standing in the confidential relation of a clerk or servant may be prohibited, subject to certain exceptions, from disclosing any part of the transactions of which he so acquires a knowledge; and in *Gartside v. Outram*, 26 Law J. Chanc. 113, the plaintiffs filed a bill for an injunction to restrain their former clerk from disclosing any of their transactions; the clerk, by his answer, stated that the plaintiffs carried on their business in a fraudulent manner, specifying the particulars, and filed interrogatories for the examination of the plaintiffs, containing questions as to the alleged fraudulent transactions; and it was held that the plaintiffs were bound to answer these interrogatories. Wood, V. C.: 'The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist.' Having referred to *R. v. Avery*, *ante*, p. 585, and said that, 'If there is a discrepancy of authority upon the subject, I much prefer the decision of Patteson, J.,' Wood, V. C., next cited *Annesley v. The Earl of Anglesea*, and spoke of it as a case, 'in which the point is put so ably and clearly by the counsel in argument, that I adopt that argument as the best expression of my opinion,' and then read Sergt. Tisdall's argument, *supra*, and the parts of the judgments of Bowes, C. B., and Mounteney, B., *supra*. See also *R. v. Cox and Railton*, 14 Q. B. D. 153, *post*, p. 592.

(*h*) 3 Burr, 1687, cited by Lord Ellenborough in *Amey v. Long*, 9 East, 485.

(*i*) See also *Laing v. Barclay*, 3 Stark. 38; *Harris v. Hill*, 3 Stark. N. P. C. 140; *S. C.* 1 Dowl. & Ry. N. P. C. 17; *R. v. Upper Boddington*, 8 Dowl. & Ry. 726.

(*j*) *R. v. Horne*, 11 St. Tr. 283.

The privilege does not attach to everything which the client says to his solicitor; the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the solicitor is employed; if it is necessary it becomes privileged, (*k*) but if it is not it may be disclosed. Thus a solicitor may be examined like any other witness to a fact which he knew before his retainer, that is, before he was addressed in his professional character (*l*) or where he has made himself a party to the transaction, (*m*) or where he is questioned as to a collateral fact which he might have known without being entrusted as the solicitor in the cause. (*n*) Thus he may prove his client's handwriting, though the knowledge was obtained from witnessing his execution of the bail bond in the action. (*o*) And he may be called to prove his client's identity. (*p*) And if he is a subscribing witness to a deed he may be examined concerning the execution. (*q*) But he ought not to be permitted to discover any confessions which his client may have made to him on such head. (*r*) So if the solicitor were present when his client was sworn to an answer in chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge, and no matter of secrecy committed to him by his client. (*s*) So the solicitor of one of the parties may be examined as to the contents of a written notice which had been received by him in the course of a cause, requiring him to produce papers; (*t*) for the privilege only extends to confidential communications from the client, and not to those from collateral quarters, although made to him in consequence of his character as a solicitor. (*u*) So a solicitor conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to shew the real party, and so let in his declarations. (*v*) So a solicitor may be called and asked whether he has not a particular document in his possession, in order to let in secondary evidence, if the document is not produced. (*w*) And where an action on a promissory note had been

(*k*) *Per curiam*: *Gillard v. Bates*, 6 M. & W. 547. There an attorney was sued for work and labour in issuing an execution, and the defence was that he was employed by B., and not by the defendant, and it was held that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he, the plaintiff, had been employed by B. to issue the execution in question and that this was not a privileged communication.

(*l*) *Cuts v. Pickering*, 1 Vent. 197. *Lord Say and Seale's case*, 10 Mod. 41. 1 Phill. Ev. 166.

(*m*) *Duffin v. Smith, Peake*, N. P. C. 108. *Robson v. Kemp*, 5 Esp. 52.

(*n*) Bull. N. P. 284. 1 Phill. Ev. 175.

(*o*) *Hurd v. Moring*, 1 C. & P. 372, *Abbot, C. J.*

(*p*) *Studdy v. Saunders*, 2 Dow. & Ry. 347; but see *Parkins v. Hawkshaw*, 2 Stark. N. P. C. 239.

(*q*) *Doe v. Andrews, Cowp.* 846. *Robson v. Kemp*, 4 Esp. 235. S. C. 5 Esp. 52. *Weeks v. Argent*, 16 M. & W. 817. For if an attorney puts his name to an instrument as a witness, he makes himself thereby a

public man, and is no longer clothed with the character of an attorney: his signature binds him to disclose what passed at the execution of the instrument, but not what took place in the concoction and preparation of the deed: by *Lord Ellenborough*, 5 Esp. 54.

(*r*) Bull. N. P. 284.

(*s*) Bull. N. P. 284, 285. But he is not bound to speak to the particulars of a bill of exchange entrusted to him by his client; for the existence of such a bill is not a mere fact, but consists of circumstances, which he came to be acquainted with from the delivery of the bill to him by his client. *Brard v. Ackerman*, by *Lord Ellenborough*, 5 Esp. 120.

(*t*) *Spenceley v. Schulenburgh*, 7 East, 357.

(*u*) So an admission of a debt made by a solicitor to the adverse party, by direction of his client, is not privileged. *Turner v. Railton*, 2 Esp. 474.

(*v*) *Levy v. Pope, Moo. & Mal.* 410, *Parke, J.*

(*w*) *Coates v. Birch*, 2 Q. B. 252. *Dwyer v. Collins*, 7 Exch. R. 639; though it appears

compromised by the defendant's paying part of the money, and giving a warrant of attorney to confess judgment for the residue, and in the interval between the time when the warrant of attorney was given, and the time the money became due according to the defeasance thereof, the plaintiff told his attorney in the suit, that he was glad it was settled, for that he had not given consideration for the note, and he knew it was a lottery transaction; it was held, that the attorney was admissible to prove this conversation in an action to recover back the money. (x) The communication, said Lord Kenyon, was not made by the client in confidence as instructions for conducting his cause; on the contrary, the purpose in view had been already obtained, and what was said was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Where a prisoner being in custody on a charge of forgery wrote a letter to a person, desiring him to ask Mr. G. or any other solicitor, whether the punishment of forging a bill is the same where the names of the parties are entirely fictitious, as where the names are those of real persons: it was held that this letter was not a privileged communication. (y)

Foster had charged Brown before a magistrate with embezzlement, and had produced his day-book and cash-book, which were examined both by Brown's counsel and the magistrate, and no entry of the sum alleged to have been embezzled was found in them. Brown was remanded on bail, and at that time he had a key of the counting-house in which the books were kept. When brought again before the magistrate the day-book was again produced, when there was found in it, in the handwriting of Brown, an entry of the sum in question; and the charge was dismissed. Brown then brought an action against Foster for a malicious prosecution, and it was held that on the trial of that action, the counsel of Brown might be called to prove that the entry was not in the book on the first hearing before the magistrate; for the counsel of Brown did not acquire his knowledge of the contents of the book from his client; and he was only called upon to say what he himself saw upon the document, not what was communicated to him by his client. (z)

Where in an action against the managing director of a projected railway company, by a shareholder, to recover his deposits on the ground of fraudulent misrepresentations and failure of consideration, an attorney, who had been served with a *subpœna duces tecum* to produce the minute-book of the company, declined to produce it, on the ground that he had received it, after the company had ceased to exist, from a member of the provisional committee, for the purpose of defending him in an action brought against him as such; it was held that he was not bound to produce it, although it was contended that the plaintiff was equally interested in the book with the person

that he obtained it from his client in the course of a communication with reference to the cause. *Bevan v. Waters*, Moo. & Mal. 235, Best, C. J. So a solicitor's clerk may be asked whether he has not received a particular paper from his client. *Eicke v. Nokes*, Moo. & Mal. 303, Lord Tenterden,

C. J.; *Duffin v. Smith*, Peake, N. P. C. 108, by Lord Kenyon.

(x) *Cobden v. Kendrick*, 4 T. R. 432.

(y) *R. v. Brewer*, 6 C. & P. 363, J. A. Park, J.

(z) *Brown v. Foster*, 1 H. & N. 736.

from whom the attorney received it. (a) It follows from this decision that, where an attorney holds a document for a client, he cannot be compelled to produce it by a person who has an equal interest in it with his client. So also confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact, that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related. (b)

Where in an action on a promissory note it appeared that the plaintiff, being employed by the defendant as her attorney, had written to ask her for information in order to assist him in preparing a case for the opinion of counsel; it was held that he could not give in evidence an account of moneys paid and received, which had been sent to him in consequence of his letter, for the purpose of taking the case out of the Statute of Limitations. (c)

The privilege is also confined to communications to the solicitor in his character of solicitor; and, therefore, a communication made to him, or question asked him by his client, not for the purpose of getting his *legal* advice, but to obtain information as to a matter of fact, is not privileged. As where a client asked his attorney whether he could safely attend a meeting of his creditors, called on the attorney's suggestions, and the attorney advised him to remain at his office for the present, and he accordingly remained there two hours to avoid being arrested; it was held that the attorney might prove all these facts, in order to shew an act of bankruptcy, in an action by his client's assignees. (d)

If a solicitor or counsel be called by his own client to give evidence, he is not privileged from cross-examination on the same matter as to which he was examined in chief, although it were a confidential communication made professionally; but the cross-examination must not extend beyond that matter. (e)

Where a party refuses to produce a document, and is justified in so doing, he cannot be compelled to disclose its contents; for it would be perfectly illusory for the law to say that a party was justified in not producing a deed, but that he was compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happened to know the contents of the document, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there might be in the deeds and titles of his estates. (f)

(a) *Newton v. Chaplin*, 10 C. B. 356. Wilde, C. J., after consulting Coltman, Maule, Cresswell, and Williams, JJ. The question was argued before the court, but no express decision given on it. However, Maule, J., observed, 'A man has a document in his possession, the disclosure of which may utterly ruin him. For his necessary defence in another action, he confides it to his attorney. Is it to be said that the attorney is bound to produce it because some other person whom he, the attorney, does not represent, and has no connection with, has an interest in it?' 'The privilege of the person who delivered the book

to the attorney, as to the book, was the same in the hands of the attorney as if he had kept the book in his own hands.'

(b) *Chant v. Brown*, 7 Hare, 79.

(c) *Cleave v. Jones*, 7 Exch. R. 421.

(d) *Bramwell v. Lucas*, 2 B. & C. 745. See *Annesley v. Lord Angelsea*, 9 St. Tr. 391, before the Barons of the Exchequer in Ireland, 1743.

(e) *Vaillant v. Dodemead*, 2 Atk. 524. *R. v. Levison*, 11 Cox, C. C. 152.

(f) *Davies v. Waters*, 9 M. & W. 608. Per Alderson, B. *Hibberd v. Knight*, 2 Exch. R. 11. *Marston v. Downes*, 6 C. & P. 381. 1 A. & E. 31.

With respect to the mode of determining the question whether the communication be privileged or not, 'in general it is the solicitor who declines to give the evidence, on the ground of professional confidence. But it is competent for the client to take the objection, and call witnesses to prove the incompetency, and the judge is to determine the law arising from the facts.' (g) Where, therefore, it was proposed to put in a written account on the part of the plaintiff, it was held that the defendant was entitled to interpose, and put in evidence a letter of the plaintiff, and examine a witness to prove that the account was confidentially communicated by the defendant to the plaintiff as her attorney. (h)

In the most recent case upon the subject it has been laid down in a judgment of the full court, (i) that only those communications which pass between solicitor and client in professional correspondence and in the legitimate course of the professional employment of the solicitor, are privileged; but that communications made to a solicitor by his client, although in professional confidence in the course of the professional employment of the solicitor are not privileged from disclosure, if made before the commission of a crime, for the purpose of being guided or helped in the commission of it. (j)

**Informers.** — There are, besides these professional communications, a number of cases of a particular description, in which, for reasons of public policy, information is not permitted to be disclosed. Courts of justice will not permit witnesses to be asked the names of those from whom they receive information as to frauds on the revenue. (k) And the rule of public policy which protects a witness from being asked such questions as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer. Therefore a witness for the Crown in a revenue prosecution cannot be asked in cross-examination, 'Did you give the information?' (l) In many trials for high treason, the same course has been adopted; and if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges. (m) 'If the name of an informer,' said Buller, J., in *Hardy's case*, 'were to be disclosed, no man would make a discovery, and public justice would be defeated.' And this privilege not only protects the actual informer himself, but those questions, which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Thus a person who has been employed to collect secret information for the executive government, (n) or for the service of the police, is not allowed to reveal the name of his employer, or the

(g) Per Martin, B., *Cleave v. Jones*, 7 Exch. 421.

(h) *Cleave v. Jones*, *supra*, Erle, J., at the trial, and sanctioned by the Court above; and per Rolfe, B., at the first trial of the same cause. Hereford Sum. Ass. 1849. MSS. C. S. G.

(i) Pollock and Huddleston, B. B., and Grove, Hawkins, Lopes, Stephen, Watkin, Williams, Mathew, Day, and A. L. Smith, JJ.

(j) *R. v. Cox & Railton*, 14 Q. B. D. 153.

(k) By Dallas, C. J., in *Home v. Bentinck*, 2 Brod. & Bing. 162. *Hardy's case*, 24 How. St. Tr. 753. But where a person officiously interferes to inform any of the constituted authorities of alleged abuses, the communication is not privileged; and, if untrue, may be considered malicious and actionable. *Robinson v. May*, 2 Smith, 3.

(l) *A. G. v. Briant*, 15 M. & W. 169.

(m) 2 Brod. & Bing. 162.

(n) A shorthand writer sent to Ireland by the government. *R. v. O'Connell*, 1 Cox, C. C. 403.

nature of the connection between them; (o) or the names of any persons to whom he has communicated his information for the purpose of its being transmitted, (p) whether those persons were magistrates, or concerned in the administration of government, or were merely the channel through which information was conveyed to government. (q)

In the *A. G. v. Briant*, (r) Pollock, C. B., during the argument, said, 'In ordinary prosecutions the name of the sovereign is used; but it may be used by any prosecutor; and probably the rule does not apply at all to such cases. But there may be reasons of state policy, whenever the government is directly concerned; and then the rule applies whatever be the offence. Where, however, on an indictment for administering corrosive sublimate with intent to murder, it appeared that some communication had been made to the police, on which they searched a privy used only by the prisoner, and found in the soil a phial containing corrosive sublimate, and on the trial the policeman was asked from whom he had received the information, and he stated that all the police had received printed instructions, one of which forbade them to name persons from whom any information was received; and he therefore refused to say who were his informants unless ordered to do so by his superintendent. Cockburn, C. J., ordered him to answer the question, and he answered that he had it from two girls, who were not called for the prosecution. (s)

**Official communications.** — Upon the same ground the attorney-general of Upper Canada was not allowed to be asked as to the nature of a communication made by him to the governor of the province. (t) So the orders given by the governor of a foreign colony to a military officer under his command ought not to be produced. (u) So Abbott, C. J., refused to admit in evidence the report of a military court of inquiry, in an action of libel by an officer, respecting whose conduct the court had been appointed to inquire; and his decision was confirmed on error in the Exchequer Chamber. (v) And Lord Ellenborough, C. J., would not permit the contents of a letter, written by an agent of government to Lord Liverpool, then secretary of state, or his lordship's answer, to be produced as evidence. (w) In *Watson's case*, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced by the defendant, was accurate. (x)

But a letter written by a private individual to a public officer (the chief secretary of the postmaster-general) complaining of the misconduct of a person under him, does not fall within the preceding

(o) 24 How. St. Tr. 753. 1 Phill. Ev. 178.

(p) 24 How. St. Tr. 811.

(q) By Abbot, J., in *R. v. Watson*, 2 Stark. 136. Stone's case, as cited by Lord Ellenborough, C. J., *ibid*.

(r) *Supra*.

(s) *R. v. Richardson*, 3 F. & F. 693. Cockburn, C. J., pointed out that it was most material to the ends of justice that the persons should be named, as they could have stated how it was that they came to

know that the bottle was where it was found, and perhaps could have given some clue as to the person who put it there.

(t) *Wyatt v. Gore*, Holt, N. P. C. 299, ruled by Gibbs, C. J. 1 Phill. Ev. 181.

(u) *Cooke v. Maxwell*, 2 Stark. N. P. C. 185.

(v) *Home v. Lord F. C. Bentinck*, 2 Brod. & Bing. 130.

(w) *Anderson v. Hamilton*, (n.), 2 Brod. & Bing. 156.

(x) 2 Stark. 148.

cases. They were all cases of communication made by and between ministers and officers of government, and in the course of the discharge of a public duty by the person making the communication. (y)

A prosecution instituted or carried on by the Director of Public Prosecutions is a public prosecution, and the Director, if called as a witness at the trial, or during any proceedings arising out of the trial, is entitled to refuse to disclose the names of persons from whom he has received information, and the nature of the information received, unless the judge is of opinion that the disclosure of the name of the informant, or of the nature of the information, is necessary or desirable in order to shew the prisoner's innocence. This rule is one of public policy and is not a matter of discretion, and it makes no difference that the Director is willing to answer the questions. He ought not to be allowed to do so. (z)

The question whether the production of a document would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he attends and states that in his opinion the production of the document would be injurious to the public service, the judge ought not to compel the production of it. If indeed the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not, as the judge may think proper, or sends a subordinate with the document with instructions to object, but nothing more, the case may be different. (a)

In the *Case of the Seven Bishops*, the clerk of the privy council was compelled to state what passed in the Council Chamber, and even what was said by the King himself, although the counsel for the Crown objected to it. (b) And the same evidence was allowed in *Lord Strafford's case*. (c) But in *Layer's case*, (d) it seems to have been considered that the minutes taken before the privy council were not to be divulged; and that the two other cases above cited were decided under the strong feelings which the circumstances of the times had produced; and the latter in particular has been considered as a very unwarrantable departure from law and justice. (e)

A clerk attending upon a grand jury shall not be compelled to reveal that which was given them in evidence; (f) and the jurors themselves are bound by oath not to disclose what passes before them; but it has been held that a grand jurymen may be called to

(y) *Blake v. Pilfold*, 1 M. & Rob. 198, Taunton, J.

(z) *Marks v. Beyfus*, 25 Q. B. D. 594. 42 & 43 Vict. c. 22. 47 & 48 Vict. c. 58.

(a) *Beatson v. Skene*, 5 H. & N. 838, 29 L. J. Ex. 430. *Martin, B., dissente*: he thought that whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. In *Dickson v. the Earl of Wilton*, 1 F. & F. 419, where

a clerk from the War Office was called to produce a letter written by a commanding officer of a regiment to his immediate superior, but submitted on behalf of the secretary of war whether it ought to be produced, Lord Campbell, C. J., held that it ought. See *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255.

(b) 4 St. Tr. 346.

(c) 1 St. Tr. 723.

(d) 6 St. Tr. 288.

(e) 1 Phill. Ev. 182.

(f) 12 Vin. Abr. Evidence B., a, 5.



prove who was the prosecutor of an indictment; for it is a question of fact, the disclosure of which does not infringe on his oath. (*g*) But where the grand jury returned a bill of indictment containing ten counts for forging and uttering the acceptance of a bill of exchange, with an endorsement, 'a true bill on both counts.' Patten-son, J., would not allow one of the grand jury to be called as a witness, after the prisoner's trial had commenced, and after the grand jury had been discharged, to explain their finding. (*h*) And the Court of King's Bench have refused to receive an affidavit from a grand jurymen as to the number of grand jurors who concurred in finding a bill. (*i*)

But where a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury; and he immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed; and the witness was committed for perjury, to be tried upon the testimony of the gentleman of the grand jury. It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom bills were found. This was a privilege which might be waived by the Crown. (*j*) And so where the prisoner was indicted for perjury in evidence given before the grand jury on a bill of indictment, a police constable, who was in the grand-jury room at the time the evidence was given, was called to prove the evidence of the prisoner, and it was urged that one of the grand jury would not be allowed to give the evidence, and that if this witness were allowed to do so, it would be doing that indirectly which could not be done directly; Tindal, C. J., held that the evidence might be given, as it was for the purposes of public justice. (*k*)

(*g*) *Sykes v. Dunbar*, Selw. N. P. 1059, per Kenyon, C. J.

(*h*) *R. v. Cooke*, 8 C. & P. 582.

(*i*) *R. v. Marsh*, 6 A. & E. 236.

(*j*) Christian's Note, 4 Bl. Com. 126. There appears to be very little weight in the reason assigned for the concealment even before the Prisoner's Counsel Bill passed, because the prisoner had in far the greater number of cases heard the evidence of the witnesses before the magistrate, and there is still less weight now, since the prisoner is entitled to copies of the depositions. And the oath itself seems not to apply to the facts proved before the grand jury; as far as regards this subject, it is 'the King's counsel, your fellows' and your

own, you shall keep secret.' 4 Chitt. Cr. L. 183. C. S. G.<sup>1</sup>

(*k*) *R. v. Hughes*, 1 C. & K. 519. In 2 Rolle Abr. 77 (F.) 1, we find 'if a man empanelled and sworn on the Grand Inquest discover to strangers the evidence given to him and the rest of the jurors for the King, this is an offence punishable by fine and imprisonment on an indictment. Mich. 15, Ja. B. R. in Smithe & Hill's case admit. And the clerks of the Crown Office said that this is usual.' In 27 Ass. pl. 63, a grand jurymen was indicted as a felon for discovering what took place before the grand jury; but it was said that some justices held that this was treason: he was arraigned, however, for felony only,

#### AMERICAN NOTE.

<sup>1</sup> See *Low's case*, 4 Greenl. 439. *Imlay v. Rogers*, 2 Halst. 347. *P. v. Halbut*, 4 Denio, 183. *S. v. Broughton*, 7 Ired. 96.

In *Watson's case*, (l) a witness was questioned by the counsel for the prisoner as to his having produced and read a certain writing before the grand jury, and Lord Ellenborough, C. J., said that he had considerable doubt upon the subject; he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer. But it has since been held that a witness for the prosecution in a case of felony may be asked on cross-examination whether he has not stated certain facts before the grand jury, and that the witness is bound to answer the question. (m)

A witness was not allowed by Lord Ellenborough to be asked as to the expressions or arguments which a member of the House of Commons had made use of in the House; for, said his lordship, it would be a breach of duty in the witness (who was a member himself), and a breach of his oath, to reveal the councils of the nation; (n) but as to the fact of the plaintiff's having taken part in the debate, he was bound to answer. (o) So a member may prove who acted as speaker on a particular occasion. (p)

In 1818 the following resolutions were passed by the House of Commons: 'Resolved, *nemine contradicente*, that all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence. Resolved, *nemine contradicente*, that no clerk or officer of this House, or shorthand writer employed to take minutes of evidence before this House, or any committee thereof, do give evidence elsewhere in respect of any proceeding or examination had at the bar or before any committee of this House, without the special leave of the House.' (q)

Since these resolutions it has been held that a member of the House who acts as teller on a division is not an officer of the House; and if a member be asked how another member voted on

and acquitted: and a *quære* is added as to what the judgment would have been if he had been convicted. In the *Poulterers' case*, 9 Rep. 55 b, the judges heard the evidence given to the grand jury openly in court. In the *Earl of Shaftesbury's case*, 3 Harg. St. Tr. 417, on a bill of indictment for high treason the evidence was given in public before the grand jury, who doubted as to the legality of the proceeding; but *Pemberton and North*, C. JJ., both declared that it had always been the practice to examine the witnesses publicly before the grand jury whenever it had been requested by those who prosecuted for the King. This practice seems strongly to shew that any person not a grand juror is competent to prove what he has heard a witness state before the grand jury; for it cannot be doubted that any of the public present in Court when the grand jury heard the evidence openly might prove what he heard. *Shaftesbury's case* is said to have been the last instance of such a procedure. 4 Bl. Com. 302, Edit. Chr.

(l) 32 How. St. Tr. 107.

(m) *R. v. Gibson*, C. & Mars. 672, Parke, B. It has been held that when the grand jury have found a bill, the judges before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn before they went before the grand jury, and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely. *R. v. Russell*, C. & Mars. 247. *Gurney, B.*, and *Wightman, J.*; and *Wightman, J.*, added, that Lord Denman, C. J., and himself had decided the same point the same way on the Northern Circuit.

(n) *Plunkett v. Cobbett*, 5 Esp. 137. 29 How. St. Tr. 71, 72.

(o) 5 Esp. 137.

(p) *Chubb v. Salomons*, 3 C. & K. 75. *Pollock*, C. B.

(q) See 2 C. & K. 483. During the recess it has been the constant practice of the Speaker to grant such leave on the application of the parties to a suit. *May's Law of Parl.* 314. See also 55 & 56 Vict. c. 64, vol. i. p. 487.

a particular occasion, he will not be compelled to answer if he decline doing so, and have not the leave of the House to give evidence. (r)

## SEC. II.

*How Witnesses ought to be examined, and what Questions they may be Asked, and compelled to Answer.*

Before a witness is examined, he must be sworn in open court. The proper method of administering the oath, and the objections which may be made previous to the administration of it, will be hereafter considered. (s) And the proper time and mode of objecting to the competency of a witness, whether on the *voire dire*, or at a later stage of the trial, will be discussed in the last section of this chapter. (s)

After a witness has been regularly sworn, the party who has called him proceeds to examine him in chief; respecting which examination the most important rule is, that leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggest to him the answer he is expected to make. But this objection is not allowed to be applied if the question is merely introductory, and one which, if answered by *Yes* or *No*, would not be conclusive on any of the points of the issue; for it is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry. (t)

Thus in an action of *assumpsit* against two, in order to prove that the defendants were partners, the first witness was asked whether one of them had interfered in the business of the other. And upon this question being objected to as leading, Lord Ellenborough ruled that it might properly be asked. (u) An affirmative answer to this question would not have been conclusive, for the defendant might have interfered, without making himself a partner. So where the witness called to prove the partnership of the plaintiffs could not recollect the names of the component members of the firm, so as to repeat them without suggestion, but said he might possibly recognise them, if suggested to him; Lord Ellenborough (alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names) ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. (v) Upon the trial of *De Berenger* and others,

(r) *Chubb v. Salomons*, 3 C. & K. 75. Pollock, C. B., after consulting the other Barons.

(s) *Post*, sec. 7, p. 653.

(t) *Nicholls v. Dowding*, 1 Stark. N. P. C. 81. A prisoner for felony was tried, but the jury were discharged, owing to their being unable to agree. On being put on trial before a second jury, the judge, at the prisoner's request, instead of having

the witnesses examined, simply called and swore them, and read over his notes, allowing liberty to examine and cross-examine each witness thereafter. Held, that this was an irregular practice whether the prisoner assented to it or not. *R. v. Bertrand*, 10 Cox, C. C. 619.

(u) 1 Stark. N. P. C. 81.

(v) *Acarro v. Petroni*, 1 Stark. N. P. C. 100.

before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness (a post-boy, who had been employed to drive one of the actors in the fraud) to identify De Berenger with that person; and Lord Ellenborough held, that for this purpose the counsel for the prosecution might point out De Berenger to the witness, and ask him whether he was the person. (*w*) So in *R. v. Watson*, (*x*) tried at bar, upon its becoming necessary to identify three of the prisoners, it was objected, that the attention of the witness was too directly pointed to them; but the Court held, that the counsel for the prosecution might ask in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where the plaintiff's son, being called as a witness for his father, was cross-examined as to the contents of a letter received by him from the plaintiff, which he swore had been lost, and mentioned some particular expressions as part of its contents; and witnesses were called on the part of the defendant to speak to the contents of the same letter; Lord Ellenborough ruled that the defendant's counsel might ask one of them, who had first exhausted his memory by stating all he recollected of the letter, whether it contained the particular expressions sworn to by the plaintiff's son; for otherwise, said his lordship, it would be impossible ever to come to a direct contradiction. (*xx*)

When, upon cross-examination, a witness has denied having used particular expressions, or having made a particular statement to A. B., who is afterwards called on the part of the adverse party, for the purpose of contradicting the first witness, by proving that he actually did speak the words, or make the statement to him, it is very usual in practice for the counsel of the adverse party, in examining A. B. in chief as his own witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or made such and such a statement. And accordingly, where a witness of the plaintiff's, in cross-examination, had been asked as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and he had denied having used them; Abbott, C. J., held, that the defendant's counsel, having called a person to prove that the former witness had used such expressions, was entitled to read to his own witness the particular words from his brief. (*y*) However, a very able writer (*z*) has with great force endeavoured to shew, that leading questions under such circumstances are irregular.

But this rule does not apply to conversations which are evidence themselves. A witness who was present at the time of the apprehension of the plaintiff by the defendant, was asked whether he had not used certain expressions in a conversation which then took place between the plaintiff and defendant, which he denied; and Erskine, J., held that a person who was called to prove that the witness had said what he had denied could not be examined by

(*w*) 1 Stark. Ev. p. 167.

(*x*) Stark. N. P. C. 128.

(*xx*) *Courteen v. Touse*, 1 Campb. 43.

(*y*) *Edmonds v. Walter*, 3 Stark. N. P. C. 7.

(*z*) 2 Phill. Ev. 404, 405. The practice, however, is perfectly well settled as stated in the text. C. S. G., and see 1 Stark. Ev. 169, 170.

the counsel reading from his brief the very words which the witness had so denied having used, but that the examination must proceed in the usual way by asking what had passed. (a) Where one witness has given an account of what a prisoner has said on a particular occasion, and another is called for the prisoner to give a different account, the proper course is to call upon him to give his version of the matter; and when he has done so, then to ask him whether this or that expression has been used; for this is not like the case of a proposed contradiction, where a witness has denied that certain specific words were used. (b)

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the Court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in the discretion of the judge to determine how far he will allow the examination in chief to be by leading questions. (c) And where an issue had been directed by the Court of Chancery, with power to examine the parties, Best, C. J., held that the defendant stood in a situation which of necessity made him adverse to the plaintiff, by whom he was called, and that the counsel for the plaintiff might, as a matter of right, cross-examine him. (d) But in general, the fact of a witness being an unwilling or adverse witness is to be ascertained by the nature of his evidence, his manner of answering, and demeanour, before the unrestricted power of leading can be given; it is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner, or that he has been informed against by the prosecutor, to justify the counsel in beginning at once with the cross-examination. (e)

After the examination in chief is closed, the other party is at liberty to proceed to cross-examination, without regard generally to the rule restricting examinations in chief in respect to leading questions.

If the witness betrays a zeal against the cross-examining party, or shews an unwillingness to speak fairly and impartially, he cannot, it should seem, be led too much. (f) But where the witness on the

(a) *Hallett v. Cousens*, 2 M. & Rob. 238.

(b) *R. v. Fussell*, 3 Cox, C. C. 291. Wilde, C. J., Maule, J., and Parke, B.

(c) 2 Phill. Ev. 403. In *Bastin v. Carew*, R. & M. N. P. R. 127, Abbott, C. J., allowed the cross-examination of an adverse witness, and said, 'I mean to decide this, and no further—that in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice.' *R. v. Chapman*, 8 C. & P. 558, Lord Abinger, C. B. *R. v. Murphy*, 8 C. & P. 297, Coleridge, J.

(d) *Clarke v. Saffery*, R. & M. N. P. R. 126.

(e) 2 Phill. Ev. 404, citing *R. v. Ball*, 8 C. & P. 745, where a witness called on the part of the prosecution contradicted

the prosecutor as to the fact of the prisoner having been at her house on the night when the offence was committed, and it appeared that she was intimately acquainted with the prisoner, and that the prosecutor had informed against her for keeping her beerhouse open at improper hours; and on its being submitted that these facts raised such an inference of hostility towards the prosecutor, and of bias in favour of the prisoner, as to entitle the counsel for the prosecution to cross-examine her; Erskine, J., said, 'I think that the situation in which this witness stands towards either party, does not give the party calling the witness a right to cross-examine her, unless her evidence was of itself of such a nature as to make it appear that she was an unwilling witness.'

(f) 2 Phill. Ev. 406.

other hand discovers an anxiety to serve the cross-examining party, although the courts do not usually exclude the counsel, on cross-examination, from putting leading questions, it is obvious that evidence so obtained is very unsatisfactory, and is open to much observation. (*g*) And although the witness may be led on cross-examination to bring him directly to the point as to the answer, yet if he has betrayed an inclination to lean, and be favourable to the cross-examining party, it is not allowable to go the length of putting into the witness's mouth the very words which he is to echo back. (*h*) But the practice has generally been to put leading questions in cross-examination to a witness, whether willing or adverse; and where a counsel was putting leading questions in the usual way to a witness who appeared favourable to the side of the counsel who was cross-examining him, and this was objected to; Alderson, B., said, 'I apprehend that you may put a leading question to an unwilling witness on the examination in chief at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not.' (*i*)

A witness cannot be asked, upon cross-examination, except for the purpose of impeaching his credit, questions which are not in any way relevant to the matters in issue; (*j*) the subject of cross-examining for the purpose of impeaching his credit will perhaps be more conveniently discussed in a subsequent section, (*k*) in which place (*l*) will also be considered the obligation of a witness to answer questions tending to subject him to a criminal prosecution, or degrading to his character. It is, however, proper to mention in this place how far a witness is compellable to answer a question, whereby he may subject himself to a civil action, or charge himself with a debt. Considerable doubts had been entertained upon this subject, before the 46 Geo. 3, c. 37; for the settlement of which it was thereby declared and enacted, that a witness cannot by law refuse to answer any question relevant to the matter in issue (the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever) by reason only, and on the sole ground that the answering such questions may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of His Majesty, or any other persons. (*m*). It seems a witness is still privileged from answering any question, the answer to which might subject him to a forfeiture of his estate. (*n*)

(*g*) Mr. Starkie, in his Treatise on Evidence, vol. i. p. 197, mentions that he has heard Lord Tenterden express himself to this effect more than once.

(*h*) By Buller, J., in Hardy's case, 24 How. St. Tr. 755, referring to a rule laid down on the day before by Eyre, C. J., to the same effect.

(*i*) *Parlin v. Moon*, 7 C. & P. 408.

(*j*) A cross-examination as to a fact otherwise irrelevant, is not warranted by the circumstance that the adverse counsel opened it, without any attempt at proof. *Lucas v. Novosilieski*, 1 Esp. N. P. C. 296.

(*k*) Sec. 3.

(*l*) *Post*, p. 612.

(*m*) See *R. v. Woburn*, 10 East, 395. 2 Phill. Ev. 420. There is a distinction between the obligation of a witness, since this statute, to answer questions, though they may subject him to civil suits; and his obligation to produce writings, &c., under a *subpoena duces tecum*. For if a *subpoena duces tecum* is served, the party must bring his deeds into court in obedience to the subpoena, although, if he states that they are his title deeds, no judge will ever compel him to produce them. *Pickering v. Noyes*, 1 B. & C. 263.

(*n*) 1 Phill. Ev. 264. *May v. Hawkins*, 24 L. J. Ex. 309; 11 Ex. 210. *Chester v. Wortley*, 25 L. J. C. P. 117.

Counsel upon cross-examination cannot assume that the witness has made an assertion in his examination in chief, which was not in fact made, (o) or put a question which assumes a fact not in proof. (p)

It is not allowable upon cross-examination to ask a witness, except with respect to previous statements in writing made by him, as to the contents of written instruments, (q) although they are shewn to be in the possession of the opposite party, and notice has been given to the opposite party to produce them. (r) Under what circumstances a cross-examination as to the contents of a written document, for the purpose of impeaching the credit of a witness, is allowable, will be considered hereafter in the third section of this chapter. (s)

Upon the trial of Kroehl, Gibson, and Koech, (t) for a conspiracy, where the three defendants defended separately, Koech alone called witnesses, and examined to a conversation between himself and Kroehl. The counsel for the prosecution was proceeding to cross-examine as to another conversation between Koech and Kroehl, when the counsel for the prisoner Kroehl objected, on the ground, that the effect might be to bring out a new case against Kroehl, although he had called no witnesses, and after the case for the Crown was finished; but Abbott, J., said, that as Koech had called witnesses, he could not prevent the cross-examination as to any conversations that might affect Koech. It might be a matter for future consideration whether the counsel for Kroehl, after such evidence, would have a right to address the jury upon it.

Woods and May were indicted for manslaughter, and separately defended; the counsel for Woods addressed the jury, but called no witness, and then the counsel for May addressed the jury and called witnesses, who threw the blame on Woods; and it was held that the counsel for Woods should be allowed not only to cross-examine May's witnesses, but again to address the jury. The proper course was for Woods' counsel to cross-examine first, the counsel for the prosecution next, and the counsel for May to re-examine. At the close of the evidence, Woods' counsel would address the jury, confining himself strictly to the evidence adduced for May, and then the counsel for the prosecution would reply generally. (u) So where Burdett and Luck were tried for stealing wood, and in the course of the defence of Luck, Cox was called as a witness on his behalf, with a view of shewing that Luck was an innocent agent in taking the wood, and in so doing Cox gave evidence tending to criminate Burdett; Burdett's counsel claimed the

(o) *Hill v. Coombe*, cor. Abbott, J., Manning's Digest, tit. *Witness*, pl. 236.

(p) *Doe v. Wood*, cor. Abbott, J., *ibid.* pl. 237. The objection was frequently taken and allowed during the proceedings in the House of Lords in the Queen's case. See the printed evidence.

(q) *Sainthill v. Bound*, 4 Esp. 74. *Howell v. Lock*, 2 Campb. 14. See *post*, p. 621.

(r) *Graham v. Dyster*, 2 Stark. N. P.

C. 23. *Sideways v. Dyson*, *ibid.* 49. A witness may be asked as to the contents of a written document, if the party examining is in a position to give secondary evidence of its contents.

(s) *Post*, p. 620.

(t) 2 Stark. N. P. C. 343.

(u) *R. v. Woods*, 6 Cox, C. C. 224. The Recorder, after consulting Cresswell and Williams, JJ. See *R. v. Copley*, 4 F. & F. 1097.

right of cross-examining Cox, and then addressing the jury upon his evidence; but the sessions refused permission to cross-examine and address the jury, but offered to put through the chairman such questions as Burdett's counsel suggested; it was held, on a case reserved, that, in this particular case, the counsel for Burdett had a right to cross-examine Cox, and to cross-examine him without doing so through the Court, and had also a right to reply on his evidence. But the Court must not be understood as saying that he would have had that right if the evidence of Cox had not tended to criminate him. All the Court decided was, that in this particular case the course taken was wrong. (*v*)

If a witness be called merely for the purpose of producing a written instrument, he need not be sworn, and, unless sworn, he is not subject to cross-examination. (*w*) If a witness be called, though it be through necessity, for the purpose of the mere formal proof of a document, this makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. (*x*) If a witness be called under a mistake, and the mistake be discovered before any question is put to him by the counsel who calls him, he is not liable to cross-examination, although he has been sworn. (*y*) Where a witness being sworn was asked only one immaterial question, and his evidence stopped by the judge, it was held that the opposite party had no right to cross-examine him. (*z*)

It is fully settled that the counsel for the prosecution are not bound to call every witness whose name is on the back of the indictment, (*a*) but may call what witnesses they think proper. (*b*) The prosecutor, however, ought to cause the witnesses to be present in court, because the prisoner may have neglected to bring them himself in consequence of their names being on the back of the bill. (*c*) It was formerly the practice, where the counsel for the prosecution did not call a witness whose name was on the back of the bill, for the judge to call the witness, in order that he might be cross-examined by the prisoner in the same way as if he had been called by the counsel for the prosecution; (*d*) but it is now settled

(*v*) *R. v. Burdett*, Dears. C. C. 431. See *Beale v. Moulis*, 1 C. & K. 1. On the same ground it would seem that one prisoner might call witnesses to contradict the witnesses called for another prisoner, if their evidence criminated him.

(*w*) *Simpson v. Smith*, 2 Phill. Ev. 397. See also *Davis v. Dale*, M. & M. 514. *Evans v. Moseley*, 2 Dowl. P. R. 364. *Perry v. Gibson*, 1 A. & E. 48. *Summers v. Moseley*, 4 Tyrw. 158. *R. v. Murlis*, M. & Mal. 515.

(*x*) *Morgan v. Brydges*, 2 Stark. N. P. C. 314. But see *Phillipps v. Eamer*, 1 Esp. 356. See *Reed v. James*, 1 Stark. N. P. C. 132.

(*y*) *Wood v. Mackinson*, 2 M. & Rob. 273. *Rush v. Smyth*, 4 Tyrw. 675. 1 C. M. & R. 94. *Clifford v. Hunter*, 3 C. & P. 16. *R. v. Brooke*, 2 Stark. N. P. C. 472.

(*z*) *Creedy v. Carr*, 7 C. & P. 64, Gurney, B.

(*a*) *R. v. Woodhead*, 2 C. & K. 520, Dec. 1847, where Alderson, B., said, the judges

had laid down this as a rule. *R. v. Edwards*, 3 Cox, C. C. 82. *Erle, J. A. n.* 1848. *R. v. Cassidy*, 1 F. & F. 79, March, 1858. *Parke, B.*, after consulting Cresswell, J.

(*b*) *R. v. Cassidy*, *supra*. *R. v. Edwards*, *supra*.

(*c*) *R. v. Woodhead*, *supra*. *R. v. Cassidy*, *supra*.

(*d*) *R. v. Simmonds*, 1 C. & P. 84. *Hullock, B. R. v. Whitbread*, *ibid.* note (*a*). *R. v. Bull*, 9 C. & P. 22. In *R. v. Beezley*, 4 C. & P. 220, Littledale said that the counsel for the prosecution ought to call all the witnesses on the back of the bill; and in many cases on the Oxford Circuit learned judges have directed the counsel for the prosecution to call every witness on the back of the bill, and it has been treated as if the counsel for the prisoner had a right to have them all called by the counsel for the Crown, in order to enable him to cross-examine them. Indeed, the cases have gone further than this; as it has been held on several occasions



that where a witness who is not called by the counsel for the prosecution is called by the prisoner, he must be considered his witness, as much as those subpoenaed and called by him. (e) As the witness is the prisoner's witness, it follows that the counsel for the Crown may impeach his evidence in the same manner as if he had been subpoenaed and called by the prisoner. (f)

A witness whose evidence is relevant, may be called by the prosecution, although he has not been before the magistrates, and although his name and the substance of his evidence has not been given to the prisoner or his attorney. (g)

It is reported to have been ruled by Lord Kenyon, (h) that where a witness has been examined by one party, and cross-examined by the other, and the latter has afterwards occasion to call the same

that witnesses, not on the back of the bill, but who were acquainted with the facts of the case, ought to be called on the part of the prosecution. In *R. v. Holden*, 8 C. & P. 606, on an indictment for murder, Patteson, J., directed the daughter of the deceased, whose name was not on the back of the indictment, to be called, saying, 'every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter.' And in the same case, it appearing that there had been a *post mortem* examination of the body of the deceased by a surgeon who was examined, and another surgeon who was in court, and that there was some difference of opinion as to the cause of the death; Patteson, J., said, 'As the surgeon is in court, I shall insist upon his being examined. He is a material witness, who is not called on the part of the prosecution; and as he is in court, I shall call him for the furtherance of justice.' And he was called and examined by the learned judge. In *R. v. Chapman*, 8 C. & P. 558, Lord Abinger, C. B., directed the name of the brother of the prisoner, who was present at the time when the murder was alleged to have been committed, to remain on the back of the bill, and said, the counsel for the prosecution would best discharge his duty by calling him as a witness on the trial. See also *R. v. Orchard*, *ibid.* note (b). In *R. v. Stroner*, 1 C. & K. 650, March, 1845, the prosecutrix, on a trial for rape, stated that she immediately complained to her mistress, and that her clothes were afterwards washed by a woman, and neither of these persons were bound over to give evidence, and their names were not on the back of the indictment; but both were attending as witnesses for the prisoner; and Pollock, C. B., held that they must be both called for the prosecution, but that the counsel for the prosecution must be allowed every latitude in examining them. In *R. v. Bodle*, 6 C. & P. 186, Gaselee, J., and Vaughan, B., held that it was in the discretion of the judge whether a witness whose

name is on the back of the indictment should be called for the prisoner's counsel to examine him before the prisoner was called on for his defence; and the father of the prisoner having been examined before the coroner, and bound over to give evidence at the assizes against the prisoner for murder, the learned judges held that the father ought to be called; and he was called, and asked as to statements he had made respecting the murder, with a view of discrediting and contradicting him, and thereby raising a suspicion that the witness might have committed the murder himself; and it was held that as the father had not been examined by the counsel for the prosecution, and had been only called at the instance of the counsel for the prisoner, the latter could not be allowed to call witness to contradict him as to the different accounts he had given respecting the murder. In *R. v. Vincent*, 9 C. & P. 91, Alderson, B., held that the calling such a witness in felony was discretionary, but it was a discretion always exercised, and he thought it might well be exercised in a case of misdemeanor. C. S. G.

(e) *R. v. Cassidy*, *supra*. *R. v. Woodhead*, *supra*. The following cases, therefore, cannot be considered authorities any longer. *R. v. Barley*, 2 Cox, 191, where Pollock, C. B., after consulting Coleridge, J., insisted on the counsel for the Crown calling witnesses on the back of the bill. The dictum of Alderson, B., that it was the duty of the prosecutor to put an adverse witness in the box, in *R. v. Carpenter*, 1 Cox, C. C. 72. *R. v. Beezley*, 4 C. & P. 220, where Littledale, J., held that the counsel for the Crown was confined to questions which arose out of the cross-examination of a witness whom he had directed to be called. *R. v. Harris*, 7 C. & P. 581, as far as it may tend to shew that where the witness is called by the judge, the counsel for the Crown has no right to examine him.

(f) *R. v. Woodhead*, *supra*, per Alderson, B.

(g) *R. v. Greenslade*, 11 Cox, C. C. 412. *R. v. Pietro Stiginani* (10 Cox, Crim. Cas.), overruled.

(h) *Dickinson v. Shee*, 4 Esp. 67.

witness back as part of his own case, the privilege of cross-examination continues, and leading questions may be put to him. But it has been very properly remarked, *(i)* that the mode of examination under such circumstances is in truth regulated, according to the disposition and temper manifested by the witness, by the discretion of the presiding judge. *(j)*

Where on an indictment for burglary, there was no counsel for the Crown, Taunton, J., after the examination of witnesses to facts on the part of the prisoners, recalled a witness for the prosecution, and then, addressing the prisoner's counsel, inquired if he had any question to ask upon it, saying that, although he as judge had recalled the witness for the purposes of justice, he thought it right that the prisoner's counsel should have the opportunity of cross-examining the witness again. *(k)*

The object of re-examining a witness being merely to explain the facts stated by the witness on cross-examination, he cannot be re-examined as to any facts unconnected with it; but if any material question has been omitted in the examination in chief, the practice is to suggest it to the Court, who will put it to the witness, or decline to do so, at its discretion. *(l)*

After the close of the case for the defendant, the general rule is, that the evidence in reply must bear directly or indirectly upon the subject matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. *(m)* This is the general rule, made for the purpose of preventing confusion, embarrassment, and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice. *(n)*

Where on an indictment for larceny, the case for the Crown rested merely on the fact of the stolen property being found in the house of the prisoner soon after it was lost, and a witness for the defence proved that the prisoner bought the property from a third person, who was called by the counsel for the Crown to prove not only that the prisoner did not buy the property of him, but that he saw the prisoner steal it; it was held that his evidence was only admissible as far as it went to destroy the case set up on the part of the prisoner, that is, to shew that the prisoner did not buy the property of him. *(o)* So where the defence of the prisoners was an *alibi*, viz., that they were at a public-house, a considerable distance from where the offence was committed, and it was proposed on the part of the Crown to prove in reply that the prisoners were seen near the spot at which the robbery was committed, and that, therefore, they could not have been in the public-house; Taunton, J., rejected the

*(i)* 1 Stark. Ev. 188.

*(j)* See also the observations of Abbott, C. J., in *Basten v. Carew*, Ry. & Mood. N. P. C. 127.

*(k)* R. v. Watson, 6 C. & P. 653.

*(l)* 2 Phill. Ev. 408. See *post*, p. 632, as to re-examining a witness who has been cross-examined respecting his former statements and declarations.

*(m)* 2 Phill. Ev. 408.

*(n)* *Ibid.*

*(o)* R. v. Stimpson, 2 C. & P. 415, Garrow, B. Mr. Phillpotts observes, 'This was carrying the rule very far, as the fact of seeing the prisoner steal the goods would be strong evidence that he did not buy them.' 2 Phill. Ev. 410.

evidence, saying, 'Proving that the parties were near the place at which the offence was committed is evidence in chief, and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution.' (*p*) But where on a similar indictment a similar defence was set up, Alderson, B., permitted a person who had been robbed on the road near the place where the prosecutor was robbed, to prove not only that he saw the prisoner there, but the whole circumstances under which he met the prisoner. (*q*) And so where in an action for an injury occasioned by the defendant through negligently driving a carriage, the plaintiff's witnesses described the carriage as having been driven by the defendant when the accident occurred at Layton, and other witnesses spoke to the defendant having been seen in the neighbourhood of Layton about the time in question; and the defendant called witnesses to prove that, at the time in question, he was at Richmond, and the plaintiff then tendered other witnesses to shew that the defendant was not at Richmond, but at Layton; Lord Denman, C. J., held that it would perhaps have been more correct had the plaintiff, in the first instance, called the witnesses then tendered, but he did not think that he could, even at this period of the cause, exclude the evidence from the jury, which certainly went to contradict the defendant's *alibi*. (*r*) And where on an indictment for horse stealing the defence was an *alibi*, which went to shew that the prisoner, on the 7th and 8th of March, was at places many miles from the place where the horses were stolen, and on the 9th returned home; Tilden, C. J., permitted a witness to be called to prove that the prisoner, when taken into custody on the 10th of March, said that he had been at home ever since the Wednesday before. (*s*)

Where on a trial for robbery the prosecutor proved that he had lost a large quantity of blood from his head, and that his assailant had put his arm round his neck, and the prisoner's coat appeared to have been recently stained with blood on the collar and sleeve; and the prisoner called a witness, who swore that on the day before the robbery he had observed that the prisoner's coat was bloody, and that the prisoner had told him the blood had flowed from a hare which he had carried over his shoulder; it was held that the statement of the prisoner before the magistrate, in which he had given a different account of the marks of blood, was admissible in reply to the evidence given by the prisoner. (*t*)

Where the plaintiff brought an action against the defendant for imprisoning her on a false charge of stealing chaff, which was found

(*p*) *R. v. Hilditch*, 5 C. & P. 299.

(*q*) *R. v. Briggs*, 2 M. & Rob. 199. *R. v. Hilditch* does not appear to have been cited in this case. It may have been thought in this case that the evidence of the second robbery was not essential on the part of the prosecution until the *alibi* was set up, and that that rendered the proof of the

second robbery essential. See the cases collected *ante*, p. 405, *et seq.* C. S. G.

(*r*) *Briggs v. Aynsworth*, 2 M. & Rob. 168. See a learned note to this case by the reporters. And see *R. v. Frost*, 9 C. & P. 159.

(*s*) *R. v. Findon*, 6 C. & P. 132.

(*t*) *R. v. White*, 2 Cox, C. C. 192. Pollock, C. B., after consulting Coleridge, J.

in her drawer, and two witnesses called by the plaintiff stated that they had sold her chaff similar to that found in her drawer, and the defendant's witnesses pointed out marks shewing that the chaff found in the plaintiff's drawer corresponded with that belonging to the defendant, and mentioned in particular that linseed was mixed with the chaff, which was said to be unusual; it was held that the plaintiff might prove in reply that linseed mixed with chaff had been previously sent to the plaintiff. (*u*)

Where the counsel for the Crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the Court may permit the evidence to be given. (*v*)

The question whether any particular evidence ought to be admitted in reply, rests in the discretion of the Court, which will be exercised with a view to attain the ends of justice according to the circumstances of the case. (*w*)

It has already been remarked that a witness, except with respect to previous statements in writing made by him, cannot be cross-examined as to a written document in the possession of the party who calls him; (*x*) and the rule is general, that a witness cannot either be examined in chief or cross-examined as to the contents of a written document, not produced, unless the party examining or cross-examining is in a position to give secondary evidence of its contents. (*y*)

Where, in order to prove the taking of a tenement, a witness produced a book containing an entry made by him of the terms of the taking, and stated that he had no memory of them but from the book, without which he should not of his own knowledge be able to speak to the facts, but on reading the entry he had no doubt that the facts really happened; the Court held that the witness might look at the entry to refresh his memory, and give parol evidence of the letting. (*z*) So where a receipt for money has been given on unstamped paper, it may be used by the witness, who saw it given, to refresh his memory. (*a*) And where a witness, who had received money and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was allowed by Abbott, C. J., to be read over to him in court (he being informed that the paper was in his handwriting) in order to refresh his memory. (*b*) So to prove an act of bankruptcy committed some years back, a deposition made at the time by an aged witness was allowed by Lord Kenyon to be read to him for the same purpose. (*c*) And where a witness was uncertain whether an execution was put in on the 4th or 5th of May, Tindal, C. J., on the authority of the preceding case, allowed his deposition, which had been made before

(*u*) *Wright v. Willcox*, 9 C. B. 650.

(*v*) *R. v. White*, 2 Cox, C. C. 192. See this case, *ante*, p. 549.

(*w*) *Doe dem Nicoll v. Bower*, 16 Q. B. 805. *Wright v. Willcox*, 9 C. B. 650.

(*x*) *Ante*, p. 601.

(*y*) See *Meyer v. Sefton*, 2 Stark. N. P. C. 276. *Roberts v. Doxon*, Peake, N. P. C. 83.

(*z*) *R. v. St. Martin's, Leicester*, 2 A. & E. 210. The entry was made at the time of the taking.

(*a*) *Rambert v. Cohen*, 4 Esp. 213.

(*b*) *Catt v. Howard*, 3 Stark. N. P. C. 3. See also *Jacob v. Lindsay*, 1 East, 460.

(*c*) *Vaughan v. Martin*, 1 Esp. N. P. C. 440.

the Commissioners of Bankruptcy on the 12th of the same month, to be used by the witness, to refresh his memory as to the date of the execution. (d)

So where a deed bore date the 20th of June, and a witness could not recollect whether it was executed on the day of the date or not; Pollock, C. B., held that his examination taken on the 3rd of July, whilst the facts stated in it were fresh in his memory, and which was not in his handwriting, but was signed by him, might be used to refresh his memory. (e) But a witness cannot refresh his memory by such depositions, if they are not taken contemporaneously, or nearly so, with the matters to which they relate. (f)

With regard to depositions in criminal cases, it has been held that they are not available for the purpose of refreshing the memory of a witness, (g) unless they are used for that purpose with the sanction of the Court. (h)

The general rule is, that a witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the facts to which it relates; but if he cannot speak to the fact from recollection, any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing. (i) Although in general the entries ought to have been made by the witness himself, yet if another wrote them, and the witness regularly examined them from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection, he may refresh his memory by referring to them, as if he had written them with his own hand. (j) Where, therefore, a witness had attended Chartist meetings for the purpose of obtaining information and communicating it to the Government, and within two hours after each meeting he detailed such information to an inspector, who took it down from his dictation, and some of the accounts were read over to him and some he read over himself, and he often saw what the inspector wrote, but did not see all, and he signed all the papers; and the inspector proved that he took down what the witness said as nearly as possible, and read the whole over to the witness; it was

(d) *Smith v. Morgan*, 2 M. & Rob. 257. But Tindal, C. J., refused to allow the witness to look at more than the date of the transaction, as to which he was uncertain; as it would be leading a witness too much to attempt to bind him down to all that he had thus said.

(e) *Wood v. Cooper*, 1 C. & K. 645.

(f) *Whitfield v. Aland*, 2 C. & K. 1015, Wilde, C. J. No date is given in this case.

(g) *R. v. Stokes*, 4 Cox, C. C. 451, Williams, J., saying, 'The deposition is not contemporaneous with the facts deposed to, and does not fall within the description of memoranda and entries available for the purpose of refreshing a witness's memory.' In this case it was the counsel for the prisoner who proposed so to use the depositions. In *R. v. Palmer*, 5 Cox, C. C. 236, Pollock, C. B., said, 'A deposition is not the witness's own memorandum, made by him con-

temporaneously with the occurrence of the facts stated there, but a narrative taken down by somebody else from a statement subsequently made by him, and, therefore, although very good evidence for the purpose of contradicting him, it differs from the principle of the cases that relate to refreshing the memory.'

(h) *R. v. Williams*, 6 Cox, C. C. 343, and other cases, *ante*, p. 564.

(i) *Doe v. Perkins*, 3 T. R. 749, Beech v. Jones, 5 C. B. 696. S. P. on the authority of *Doe v. Perkins*. See *Henry v. Lee*, 2 Chit. Rep. 124.

(j) *Burrough v. Martin*, 2 Campb. 112. The entries were in a log-book. See 2 Phill. Ev. 413, *Duchess of Kingston's case*, 20 How. Sta. Tr. 619. *Lawes v. Reed*, 2 Lew. 152. *R. v. Phillpotts*, 5 Cox, C. C. 329. *R. v. Bird*, 5 Cox, C. C. 11.

held that the witness might refresh his memory by these papers. If he could say that when his mind was so full of the circumstances, he ascertained that the paper correctly detailed them, it was immaterial whether he ascertained it by looking at the paper himself or by hearing it read over correctly by another person. (*k*) So where a captain produced the ship's log, which was written by the mate, who was absent, but he had himself read the log about a week after it was written, when the matters contained in it were fresh in his mind, and he then thought it correct, it was held that he might refresh his memory by it. (*l*) So where an editor of a paper proved that an article on the weather had been furnished by a gentleman, who was in the habit of writing such articles for that paper, and that the manuscript could not be found, and the writer stated that he had no recollection of having furnished the particular article, but that the statements contained in the articles he had furnished were invariably true; it was held that the article might be used for the purpose of refreshing his memory. (*m*) The prisoner was a time-keeper, and T. C. was a pay clerk in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days and the wages due in respect of them in a time-book. At pay time, it was the duty of the prisoner to read out from the time-book the number of days worked by each workman, to T. C. who paid the wages accordingly. And T. C. saw the entries in the time-book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences: Held, that T. C. might refresh his memory by referring to the entries in the time-book in order to prove the sums paid by him to the workmen. (*mm*) But where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable as hearsay; the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said. (*n*)

It has been held that a witness will not be allowed to refresh his memory with a copy of a paper, though the copy was made by himself, and though the writing might have been used for the purpose. Thus it has been held that a witness cannot refresh his memory by a copy of an original memorandum, made by him six months after he wrote the original, although the original was so covered with figures as to be illegible. (*o*) But it is said that in analogy to the ordinary rules of documentary evidence, a copy may be used to refresh the memory, on proof that the original is lost. (*p*) And two cases are reported where it is said to have been held that a witness might refresh his memory by a copy. (*q*) And where a memorandum

(*k*) *R. v. Mullins*, 3 Cox, C. C. 526.  
Maule and Wightman, JJ.

(*l*) *Anderson v. Whalley*, 3 C. & K. 54.  
Talfourd, J. See *R. v. Stokes*, 4 Cox, C. C. 451.

(*m*) *Topham v. McGregor*, 1 C. & K. 320.  
Rolle, B.

(*mm*) *R. v. Langton*, 2 Q. B. D. 297.

(*n*) 2 Phill. Ev. 413.

(*o*) *Jones v. Stroud*, 2 C. & P. 196, Best, C. J.

(*p*) 1 Stark. Ev. 179, and see 2 Phill. Ev. 416.

(*q*) *Tanner v. Taylor*, cited in *Doe v. Perkins*, 3 T. R. 749, where a witness produced a copy of a day-book which he had

was made by a witness at the time on a rough piece of paper, and he copied it out more neatly, it was held that he might refresh his memory by the copy (*r*) And where a clerk to a tradesman entered the transactions in trade as they occurred into a waste-book from his own knowledge, and the tradesman copied the entries day by day into a ledger, in the presence of the clerk, who checked them as they were copied; it was held that the clerk might use the entries in the ledger to refresh his memory, although the waste-book was not produced, nor its absence accounted for; as the entries in the ledger were in the nature of entries made by the clerk himself. (*s*) A witness cannot refresh his memory by extracts made by another person from minutes or memoranda made by the witness himself. (*t*)

It is not essential that the memorandum should have been contemporary with the fact; it seems to be sufficient if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory, or enables him to swear to the truth of the fact. (*u*) When a witness refreshes his memory from memorandums, it is always usual, and very reasonable, that the adverse counsel should have an opportunity of looking at them, when he is cross-examining the witness. (*v*)

A writing cannot be used to refresh the memory, if it appears to to have been made for the purpose of the cause. Thus where a witness refreshed her memory by papers in her own handwriting, some of which were in the form of a deposition, which was drawn by the plaintiff's solicitor, whom she had requested to digest her notes and reduce them to some order; and, after he had done so, she transcribed and altered them whenever it was necessary, to make them consistent with her meaning; it was held that she ought not to have been allowed to refresh her memory by these notes. (*w*)

left at home; and Legge, B., held that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it; but if he could not from recollection swear any further than as finding the matters entered in the book, then the original should have been produced. And Anonymous, 1 Lew. 101, where Bayley, J., is reported to have held that a witness cannot give a copy of a shop-book in evidence to prove facts contained in the shop-book, but if he was originally acquainted with the facts he might refer to such copy to refresh his memory.

(*r*) R. v. Duffield, 5 Cox, C. C. 404. It is plain that where a copy is made whilst the matters are fresh in the memory of the witness, it may just as well be used to refresh the memory as if it were the original. Suppose the witness made two memoranda whilst the matters were fresh in his memory, either might be so used.

(*s*) Burton v. Plummer, 2 A. & E. 341. In this case, Patteson, J., said, 'The copy of an entry, not made by the witness contemporaneously, does not seem to me to be

admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable, whether the paper be produced as evidence in itself, or used merely to refresh the memory.'

(*t*) 2 Phill. Ev. 414, citing a case mentioned by Lord Kenyon, C. J., in Doe v. Perkins, 3 T. R. 752.

(*u*) 1 Stark. Ev. 177. 2 Phill. Ev. 414.

(*v*) By Eyre, C. J., in Hardy's case, 24 How. St. Tr. 824. 2 Phill. Ev. 411. Sinclair v. Stevenson, 1 Carr. & P. 582. But if a paper is put into a witness's hands merely to prove a handwriting, the other side have no right to see it. Ibid., per Best, C. J. If a counsel, in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And he may also ask the witness when it was written, without being bound to read it. R. v. Ramsden, 2 C. & P. 604, by Lord Tenterden. Howard v. Canfield, 5 D. P. R. 417.

(*w*) Anonymous, cited in Doe v. Perkins, 3 T. R. 752. The case was in chancery,

**Opinion of experts.** — The general rule is, that a witness must not be examined as to his opinion, for his testimony must be confined to evidence of facts; but in questions of skill and judgment, men of science or experience are allowed to give evidence of their opinion. Thus in a civil case, in an inquiry as to an embankment choking up a harbour, an engineer has been admitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour. (x) So shipbuilders have been admitted to state their opinion on the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present. (y) Where the question is whether a seal has been forged, seal-engravers may be called to shew the difference between a genuine impression and that supposed to be false. (z) So on an indictment for forging a will, which, together with writings in support of it, it was suggested had been written over pencil marks, which had been rubbed out; an engraver who had examined the paper with a mirror and traced the pencil marks, was held competent to give evidence of what he had discovered upon such examination. (a) So in several cases where the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, as inspectors of franks, and clerks of the post office, have been allowed to state their opinion whether a particular writing was in a genuine or imitated character. (b) By 28 & 29 Vict. c. 18, s. 8, as mentioned *ante*, p. 478, comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writing, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.

In criminal cases, the opinions of medical men of science are very frequently employed as evidence.<sup>1</sup> A physician who has not seen

and the Lord Chancellor suppressed the depositions. In *Skeineller v. Newton*, 9 C. & P. 313, a similar objection was made, but the point decided was that the paper was not written near enough to the transaction.

(x) *Folkes v. Chad*, MS. 1 Phill. Ev. 291, 7th edit., cited by Buller, J., in *Goodtitle v. Braham*, 2 T. R. 498. So the opinion of a person conversant with the business of insurance may be asked as to whether the communication of particular facts would have varied the terms of insurance, though not what his conduct would have been in the particular case. *Berthon v. Loughman*, 2 Stark. N. P. C. 258. *Holroyd, J.*, but see *contra Durrell v. Bederley*, Holt, N. P. C. 286, by Gibbs, C. J.

(y) *Thornton v. Royal Exchange Assur-*

*ance Company*, Peake, N. P. C. 25. *Chaurand v. Angerstein*, *ibid.* 43. *Beckwith v. Sydebotham*, 1 Campb. 117. See *Alcock v. Royal Exchange Assurance Company*, 13 Q. B. 292, where evidence that a captain was addicted to drunkenness was held admissible in order to shew that he was incapable of exercising a sound judgment in selling a ship.

(z) By Lord Mansfield in *Folkes v. Chad*, *ubi supra*.

(a) *R. v. Williams*, 8 C. & P. 434. *Parke, H.*, after consulting *Tindal, C. J.*

(b) *Goodtitle v. Braham*, 4 T. R. 497. *R. v. Cator*, 4 Esp. N. P. C. 117, 145. *Stranger v. Searle*, 1 Esp. 14. But see *Gurney v. Langlands*, 5 B. & A. 330. *Cary v. Pitt*, Peake Ev. App. 84.

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<sup>1</sup> See *P. v. Bodine*, 1 Denio, 281. *S. v. Knight*, 43 Maine, 11. *Cooke v. S.*, 4 Zab. 843. *Kennedy v. P.*, 39 N. Y. 245.

*S. v. Windsor*, 5 Harring. 512. *S. v. Terrell*, 12 Rich (Law) 321. *Wilson v. P.*, 4 Parker, C. R. 619. *C. v. Rich*, 14 Gray, 335.



the patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effect of the disease described by them, and its probable consequences in the particular case. (c) The testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established by others, and without being personally acquainted with the facts. (d) Thus where on a trial for murder the medical witnesses called on the part of the prosecution ascribed the death to strangulation, other medical men called on behalf of the prisoner were allowed to give their opinion that, from the evidence they had heard upon the trial, the death did not arise from strangulation, although they had not seen the body of the deceased, and had no means of forming a judgment of the cause of his death except from the evidence given in court. (e) So in prosecutions for murder, medical men have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death. (f) So in a case of murder, (g) where the defence was insanity, the twelve judges were unanimous in thinking that a witness of medical skill might be asked, whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. But several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz., whether, from the other testimony given in the case, the act as to which the prisoner was charged was, in his opinion, an act of insanity. (h) And it has been since held that a physician who had heard the whole evidence on a trial for murder might be asked whether the facts and appearances proved shewed symptoms of insanity. (i)

A person of experience in the profession of the law of another country may state his opinion, what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. (j)

**Witnesses ordered out of Court.** — It is usual for the Court, at the instance of either party, in criminal as well as civil cases, to make an order that the witnesses, intended to be examined on either side, shall remain out of court during the examination of the other witnesses; (k) and it was formerly held that if any person were

(c) *Peake Ev.* 190.

(d) 1 *Stark. Ev.* 175.

(e) *R. v. Shaw*, MSS. C. S. G. cor. Pattenon, J. S. C. 6 C. & P. 372.

(f) 1 *Phill. Ev.* 290, 7th edit.

(g) *R. v. Wright*, R. & R. 456.

(h) It seems that in *R. v. McNaghten*, 10 Cl. & F. 200, such questions were allowed to be asked. 29 *Law Mag.* 396. See vol. i. p. 125.

(i) *R. v. Searle*, 1 M. & Rob. 75.

(j) *R. v. Wakefield*, cor. *Hullock*, B., Murray's ed. p. 238, in which case a gentleman at the Scotch bar was examined as to whether the marriage, as proved by the witnesses, would be a valid marriage according to the Scotch law. See *ante*, p. 456.

(k) The order is made, on the application of a prisoner as an indulgence, not as a matter of right. 1 *Chit. Cr. L.* 618. 1 *Burn. Just. tit. Evidence*, p. 999.

present contrary to that order, he could not, on any account, be permitted to be examined. (*l*) But an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause. (*m*) And it used to be considered that it was in the discretion of the judge whether he would allow the witness to be examined if he had been in court in defiance of an order to withdraw. (*n*) But it is now clearly settled that the Court cannot lawfully refuse to permit the examination of the witness, though he may be fined for disobeying the order to leave the court; (*o*) and his wilful disobedience of the order may afford matter of remark on the value of his testimony.

A prosecutor merely as such has a right in a criminal case to remain in court, but if he is to be examined as a witness, the Court will order him to leave the court as well as the other witnesses. (*p*)

It sometimes happens that it is desirable that an argument as to the evidence of a witness should not be heard by him, and in such a case it is almost a right for the party desiring it to have the witness out of court while a discussion is going on as to his evidence. (*q*)

Upon the trial of a misdemeanor, the defendant is not entitled to the assistance of counsel to cross-examine witnesses, when he reserves to himself the right of addressing the jury; but counsel may argue for him any points of law that arise, and may suggest the questions to be put to the jury. (*r*)

Though the counsel for the prosecution has closed his case, and the counsel for the prisoner has taken an objection as to a defect in the evidence, the judge is at liberty to make any further inquiry of the witnesses he thinks fit, in order to answer the objection. In *R. v. Remnant*, (*s*) on a case reserved for the opinion of the judges, none of them seemed to have any doubt but that it was competent and proper for the judge to do so.

### SEC. III.

#### *How the Credit of Witnesses may be Impeached.*

There are four methods by which a person may impeach the credit of a witness who is called against him, besides the disapproval of the

(*l*) *Attorney-General v. Bulpit*, 9 Price, 4. But see *R. v. Webb*, *cor. Best, J.*, MS. Mann. Dig. p. 324.

(*m*) *Pomeroy v. Baddeley*, R. & M. N. P. C. 430. *Littleale, J. Everett v. Lowdham*, 5 C. & P. 91, *Bosanquet, J.* And it is now the ordinary course to permit, not only attorneys, but professional or scientific persons, to remain in court, the rule being considered as not applying to witnesses of those descriptions. C. S. G.

(*n*) *Parker v. M'William*, 6 Bingh. R. 683. *Beamon v. Ellice*, 4 C. & P. 585, *Taunton, J.* *R. v. Colley*, M. & M. 329. *R. v. Wyld*, 6 C. & P. 380.

(*o*) *Cobbett v. Hudson*, 1 E. & B. 11. *Chandler v. Horne*, 2 M. & Rob. 423, *Erskine, J.*

(*p*) *R. v. Newman*, 3 C. & K. 252, *Lord Campbell, C. J.* *Charnock v. Dewings*, 3 C. & K. 378. See *Selfe v. Isaacson*, 1 F. & F. 194.

(*q*) *R. v. Murphy*, 8 C. & P. 297, *Cole-ridge, J.*

(*r*) *R. v. White*, 3 Campb. 98, *Lord Ellenborough.* *R. v. Parkins*, R. & M. N. P. C. 166, *Abbott, C. J.*

(*s*) *R. & R.* 186.

facts stated by the witness. 1. By cross-examination. 2. By proof of statements made by him previous to his examination, inconsistent with his present evidence. 3. By proof of his acts and declarations touching the matters in issue. 4. By general evidence of his character.

1. As to impeaching the credit of a witness by cross-examination. If a witness be asked a question, for the purpose of shewing him unworthy of credit, the answer to which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge (as, for instance, if he be asked whether he has been guilty of theft, fraud, or any offence subjecting him to a penalty or criminal proceeding), he is not obliged to answer. (t)<sup>1</sup> So a witness is not bound to answer whether he wrote an advertisement referring to libellous letters which a prosecutor had received; and though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself. (u) An accomplice who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected as to such offences. (v) So a witness in custody upon a charge of felony cannot be asked, 'Have you not *said* that you committed the offence for which you are now in custody?' (w) So where a witness stated that he was in a room which he had let to a club on a night on which it was alleged that money had been lost by gaming; it was held that he was not bound to answer the question, 'Was there a roulette table in the room?' as his answer might tend to involve him in the danger of being indicted as the keeper of a common gaming house. (x) But although a witness is not compellable to answer questions of this description, it should seem that such questions may legally be asked. (y)

(t) See the cases collected, 2 Phill. Ev. 417. 1 Stark. Ev. 190. See also *ante*, p. 600, as to the obligation to answer where the answer might subject to a civil suit. The protection is not confined to questions where the answer would lead to an immediate conclusion of guilt, but extends to all questions that tend to criminate the witness, 'and the reason is that the party would go from one question to another; and though no question might be asked, the answer to which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.' Per Lord Tenterden, C. J. *R. v. Slaney*, 5 C. & P. 213. Thus where a witness in an action by the endorsee against the drawer of a bill, where the defence was

usury, was asked whether the bill had ever been in his possession before, and the witness said he thought his answer would have a tendency to convict him of the offence of usury, for which he had been indicted, it was held that he was not bound to answer the question. *Cates v. Hardacre*, 3 Taunt. 424. See *Maloney v. Bartley*, 3 Campb. 210.

(u) *R. v. Slaney*, 5 C. & P. 213, Lord Tenterden, C. J.

(v) *West's case*, MS. 2 Phill. Ev. 419.

(w) *R. v. Pagler*, 5 C. & P. 521, J. A. Park and Littledale, JJ.

(x) *Fisher v. Ronalds*, 12 C. B. 762.

(y) See the observations of the judges in *R. v. Watson*, 2 Stark. 149. *R. v. Holding and Wade*, O. B. 1821, *cor.* Bayley, J.,

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<sup>1</sup> See *Ward v. P.*, 3 Hill, 395. *S. v. Douglass*, 1 Mo. 374. *C. v. Howe*, 13 Gray, 26. *Newcomb v. S.*, 37 Miss. 383. *S. v. Belansky*, 3 Min. 246. *S. v. Duffy*, 15

*Iowa*, 425. *Coburn v. Odell*, 10 Foster, 540. *Pitcher v. P.*, 10 Mich. 142. *C. v. Kimball*, 24 Pick. 366.

It seems that to entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. (z)

But if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; as there is no doubt that a question, which might appear at first sight a very innocent

MS., Archb. Crim. Pl. 238. S. C. 1 Archb. Pract. 193. *Harris v. Tippet*, 2 Campb. 637, Lawrence, J. *Contra*, R. v. Lewis, 4 Esp. N. P. C. 225. *M'Bride v. M'Bride*, ibid. 242; but see 2 Phill. Ev. 426. Indeed, if the imputation contained in a question is so connected with the inquiry and the point in issue, that the fact may be proved by other evidence, and the adverse party intends to call witnesses for that purpose, the witness proposed to be discredited *must* be asked whether he has been guilty of the offence imputed, *post*, p. 620. And Lord Tenterden, has ruled that the counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture; such objection belongs to the witness only. *Thomas v. Newton*, M. & M. 48 note (a) to *East v. Chapman*. The privilege of refusing to answer questions on the ground that they tend to criminate is that of the witness alone, and neither party to the suit can take any advantage therefrom. A witness called on the part of the Crown to prove bribery against the defendant, refused to give evidence on the ground that his evidence would tend to criminate himself; the objection being overruled by the judge, he gave his evidence. Held, that the defendant could not object that such evidence was improperly received. *R. v. Kinglake*, 11 Cox, C. C. 499.

(z) *R. v. Boyes*, 1 B. & S. 311. *Osborn v. London Dock Co.*, 10 Exch. R. 698, where Parke, B., said that this was the opinion of the majority of the judges in *R. v. Garbett*, 1 Den. C. C. 236. But that report expressly states that the majority of the judges 'did not decide, as the case did not call for it, whether the mere declaration of the witness on oath that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering.' See also *Ex parte Fernandez*, 10 C. B. 3, and *Bartlett v. Lewis*, 12 C. B. (N. S.) 249. In *Fisher v. Ronalds*, 12 C. B. 762, 22 L. J. C. P. 62, Jervis, C. J., and Maule, J., expressed strong opinions that it was for the witness and not for the judge to determine whether the answer might tend to criminate. Maule, J., said, 'It is the witness who is to exercise his discretion, not

the judge. The witness might be asked, "Were you in London such a day?" and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know any thing about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.' In *Adams v. Lloyd*, 3 H. & N. 351, Pollock, C. B., cited the dictum of Maule, J., and said, 'I have always thought that the law on that subject was correctly stated by Maule, J.,' and added, 'It is impossible to satisfy the judge without exposing the whole matter; and a man may be placed under such circumstances with respect to the commission of a crime, that if he disclosed them he might be fixed upon by his hearers as a guilty person; so that the rule is not always the shield of the guilty; it is sometimes the protection of the innocent, although very likely it was originally introduced from humane motives, being probably derived from the maxim *nemo tenetur seipsum accusare*.' In *Chester v. Wortley*, 17 C. B. 410, Jervis, C. C., said, that 'In *Fisher v. Ronalds*, my Brother Maule and I thought that it was for the witness and not for the judge to determine whether or not the answer to a particular question may tend to criminate him. Some judges, however, have entertained a different opinion; but intimated no change in his own opinion. This case and *Adams v. Lloyd* were subsequent to *Osborn v. The London Dock Company* (which was cited in both of them), and *R. v. Garbett*. In *Bartlett v. Lewis*, *supra*, Byles, J., said, 'I do not concur with some of the observations which have been made as to the nature and the reasons for the privilege which a witness has to protect himself from answering as to a matter having a tendency to criminate him. The rule was intended for the protection of the innocent and not for that of the guilty.' In *Ex parte Reynolds*, 15 Cox, C. C. 108, the rule laid down in *R. v. Boyes* has been upheld by the Court of Appeal.

one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. (a)

It has also been laid down that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, — not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of law, such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. (b)

Where a pardon for an offence has been granted, the rule appears to be that the pardon removes the privilege of a witness of not answering questions, provided they are relevant to the issue; (c) but where the adverse party is attacking the witness, he is justified in refusing to answer what would disgrace him, although he has obtained a pardon. (d)

Where a witness had received a certificate under the repealed enactment 15 & 16 Vict. c. 57, s. 10, which protected witnesses who had made a true disclosure touching corrupt practices at the election of members of parliament, it was held that the witness was bound to answer, whether he had received any sums of money from a person charged with bribery, as that certificate protected him from all penal actions, penal disabilities, and criminal prosecutions of every kind. (e)

And where in an action on a bill of exchange the defence was, that the bill was drawn and accepted for the balance of an account of stockjobbing transactions, and one of the parties to the transaction objected to answer the question, on the ground that his answer might subject him to penalties under the Stockjobbing Acts; but the transaction had taken place more than three years before the trial, and the witness did not know that any proceedings had been commenced against him; Lord Tenterden, C. J., held that the witness was bound to answer the questions put to him. (f)

As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them. It seems that he is not. In *Cooke's case*, (g) on an indictment for high treason, the prisoner, in order to challenge a jurymen, asked him if he had not said he

(a) *R. v. Boyes*, *supra*, *Osborn v. London Dock Co.*, *supra*, per curiam.

(b) Per curiam, *R. v. Boyes*, *supra*, where, after a pardon of bribery, it was held that the risk of an impeachment was not sufficient to protect the witness from answering.

(c) *R. v. Boyes*, 1 B. & S. 311.

(d) Per Crompton, J., *ibid.* stating that that is the distinction between *R. v. Boyes* and *R. v. Reading*, 7 How. St. Tr. 259, 296, where the question was put in the cross-examination of a witness for the Crown;

and the *Earl of Shaftesbury's case*, 8 How. St. Tr. 817, where the question was put by a grand juror to test the character of a witness. See M. & M. 193, note (b).

(e) *R. v. Charlesworth*, 2 F. & F. 326. Ex parte Fernandez, 10 C. B. (N. S.) 3. In re Fernandez, 6 H. & N. 717. See 46 & 47 Vict. c. 51, s. 59, vol. i. p. 453, as to answers given before election courts not being admissible in evidence against the witness.

(f) *Roberts v. Allat*, M. & M. 192.

(g) 4 St. Tr. 748.

was guilty and would be hanged. Treby, C. J., overruled the question, and said, 'You may ask upon the *voire dire* (*h*) whether he has any interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified according to law by having a freehold of sufficient value; but that you may ask a juror or witness every question that will not make him criminous, that is too large. Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty; his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So persons have been excused from answering, whether they have been committed to Bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame — no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable.'

So in *Layer's case*, (*i*) the Court would not allow the witness to be examined on the *voire dire*, as to whether he had been promised a pardon or reward for swearing against the prisoner; and Pratt, C. J., said, 'If the objection goes to his credit, must he not be sworn, and his credit left to the jury? No person is to discredit himself, but is always taken to be innocent till it appear otherwise.' In *Sir John Friend's case*, (*j*) who was tried for high treason, it was held that a witness could not be asked whether he was a Roman Catholic, because he might subject himself to penalties by his answer; and Treby, C. J., said, 'No man is bound to answer any questions that will subject him to penalties or to infamy.' There are two modern decisions at Nisi Prius, in accordance with the doctrine laid down by the chief justices in the above cases. In *R. v. Lewis*, (*k*) which was an indictment for an assault, the prosecutor, in the course of cross-examination, was asked if he had not been in the House of Correction in Sussex, and Lord Ellenborough, C. J., interposed, and said, that that question should not be asked; that it was formerly settled by the judges, among whom were Treby, C. J., and Powell, J., both of whom were great lawyers, that a witness was not bound to answer any question, the object of which was to degrade, or render him infamous. *M<sup>r</sup> Bride v. M<sup>r</sup> Bride*, (*l*) was an action of *assumpsit*, in which a woman being called as a witness for the plaintiff, the counsel for the defendant was proceeding to examine her as to her living in a state of concubinage with the plaintiff, but Lord Alvanley interposed, and said, he thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. His lordship added, 'I do not go so far as others may. I will not say a witness shall not be asked to what may tend to dis-

(*h*) As to the meaning of '*voire dire*' see *post*, p. 669, note (*h*).

(*i*) 6 St. Tr. 259. 2 Phill. Ev. 424.

(*j*) 4 St. Tr. 606. 1 Stark. Ev. 206.

(*k*) 4 Esp. N. P. C. 225.

(*l*) 4 Esp. N. P. C. 242.

parage him; that would prevent an investigation into the character of a witness, which it may often be of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness.'

In the trial of *O'Coigley* and *O'Connor*,<sup>(m)</sup> for high treason, where a witness was asked, on cross-examination, how many informations he had laid for the purpose of throwing an imputation on him as a common informer, whereupon he appealed to the protection of the Court: it was held that the question should not be repeated or followed up by another.

Where on a trial for burglary a witness for the prosecution was asked in cross-examination whether he had not been charged with a crime, and imprisoned two years; Cresswell, J., held that the question might be put, but the witness was not bound to answer it, as the matter was of an infamous nature.<sup>(n)</sup>

In addition to these cases must be mentioned that of *R. v. Hodgson*,<sup>(o)</sup> which was an indictment for a rape upon Harriet Halliday. After she had given her evidence, she was cross-examined by the prisoner's counsel, who put these questions to her: 'Whether she had not before had connection with other persons?' and 'Whether she had not before had connection with a particular person (named)?' It was objected that she was not obliged to answer these questions; and Wood, B., allowed the objection, on the ground that she was not bound to answer them, as they tended to criminate and degrade her. And, on a case reserved, the twelve judges determined that the objection was properly allowed.<sup>(p)</sup>

Though a witness be not compellable to answer degrading questions, it seems allowed (as in the case of criminating questions),<sup>(q)</sup> that the questions may legally be asked.<sup>(r)</sup> In *Rose v. Blakemore*,<sup>(s)</sup> where a witness for the plaintiff refused to answer a question, whether he had published a particular handbill, on the ground that he had been threatened with a prosecution for the publication; and the counsel for the defendant, in his address to the jury, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him; Abbott, C. J., interposed and said, that no such inference ought to be drawn, and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. And in *Lloyd v. Passingham*, Lord Eldon expressed a similar opinion.<sup>(t)</sup>

<sup>(m)</sup> 26 How. St. Tr. 1353.

<sup>(n)</sup> *R. v. Parker*, 1 Cox, C. C. 76. Cresswell, J., referred to C. J. Treby's opinion, *ante*, p. 616; and if the case had been of sufficient importance it seems the question would have been reserved.

<sup>(o)</sup> *R. & R. C. C. R.* 211. But see *R. v. Barker*, 3 C. & P. 589.

<sup>(p)</sup> See *Dodd v. Norris*, 3 Campb. 519. *R. v. Holmes*, 41 L. J. M. C. 12. *R. v. Pitcher*, 1 C. & P. 85. The following cases are in favour of the position that a witness is compellable to answer questions tending to disgrace or disparage. *R. v. Edwards*, 4 T. R. 440. *Frost v. Holloway*, Ms. 2

*Phill. Ev.* 428. *Cundell v. Pratt, Moo. & Mal.* 108. See the cases, *ante*, p. 613.

<sup>(q)</sup> See *ante*, p. 613.

<sup>(r)</sup> See 1 Stark. Ev. 212.

<sup>(s)</sup> *R. & M. N. P. C.* 382. See *R. v. Watson*, 2 Stark. N. P. C. 157.

<sup>(t)</sup> 16 Ves. 64. See the note of the Reporters in *Rose v. Blakemore*, in which doubts are ably expressed, with deference to such high authorities, whether these *dicta* be not inconsistent with the general principles on which the rules concerning the right of witnesses to refuse an answer to questions have been established.

If the question be of a tendency to criminate or degrade, and the witness answers it, the cross-examining party must be satisfied with the answer, and will not be allowed to falsify it by evidence; (*u*) that is, if the question be merely collateral to the point in issue; for if it be relevant to it, and the witness deny the thing imputed, evidence may be called to contradict. Thus where a witness for a prosecution in larceny had been asked, in cross-examination, whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged of him, and would soon fix him in gaol, and had denied both; Lawrence, J., ruled, that as to the former, his answer must be taken as conclusive; but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness. (*v*)

Where on an indictment for murder, which was prosecuted by the attorney-general for the government, a police officer, on cross-examination, stated that he had attended a meeting by the direction of the commissioners of police, and that his instructions were to attend the meeting and report, and that he attended the meeting and reported; he was asked whether he attended as a spy, and the question was objected to. Lord Campbell, C. J., 'I am of opinion that it is irregular, not on the ground that the witness is called on to criminate himself, and may refuse to answer, but on the ground that he is called upon to draw an inference from the facts. It will be open to the counsel for the prisoner to denominate the witness a spy hereafter if he think fit; but I am of opinion that he cannot ask the witness, "Did you go as a spy?"' (*w*)

The privilege of refusing to answer is the privilege of the witness, and not of the party; for that reason, Lord Tenterden, C. J., refused to allow counsel to support, by argument, the privilege, as belonging to the party whom he represented. (*x*) It was formerly held that if a witness answered any questions on cross-examination on a matter rendering himself liable to forfeiture or punishment, he could not afterwards claim his privilege, but must answer throughout. (*y*) And so if a witness voluntarily answered questions tending to degrade him on his examination in chief, he was bound to answer on cross-examination, however penal the consequence may be. (*z*) But it has

(*u*) *R. v. Watson*, 2 Stark. R. 149, 151, 158. *R. v. Clarke*, 2 Stark. R. 244, per Holroyd, J. *Harris v. Tippet*, 2 Campb. 637, *cor.* Lawrence, J. For the Court will not try a collateral question whether the witness has been guilty of the misconduct imputed to him. However, in this case of *Harris v. Tippet*, which has been relied upon by very high authorities in support of the general rule (see *R. v. Watson*, 2 Stark. 155, 158), it may be perhaps doubted whether the decision of the learned judge in this particular instance was correct, although the principle laid down by him undoubtedly is so. The witness being called for the defendant, was asked whether he had not attempted to dissuade a witness examined for the plaintiff from attending the trial; the question, therefore, it may

be argued, was not altogether collateral, but so connected with the cause that other witnesses might be called to contradict him. See the Queen's case, 2 B. & B. 311, *post*, p. 629, and see the cases where a prosecutrix in rape has been contradicted by other witnesses, *ante*, p. 424.

(*v*) *Yewin's case*, 2 Campb. 638; see also the Queen's case, 2 B. & B. 313, and *post*, p. 629.

(*w*) *R. v. Barnard*, 1 F. & F. 240.

(*x*) 2 Phil. Ev. 418, citing *Thomas v. Newton*, M. & M. 48 n.

(*y*) *East v. Chapman*, M. & M. 46. Lord Tenterden, C. J., *Dixon v. Vale*, 1 C. & P. 278. Best, C. J.

(*z*) Per Dampier, J., *Winchester Sum. Ass.* 1815, *Mann. Ind. Witness*, 222.



since been held that it makes no difference in the right of a witness to protection that he has chosen to answer in part; and the witness is entitled to protection at whatever stage of the examination he chooses to claim it. (a)

By the 28 & 29 Vict. c. 18, s. 6, (b) 'a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal parts) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court, or other officer having the custody of the records of the Court, where the offender was convicted, or by the deputy or clerk of such officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.'

Where before the C. L. P. Act, 1854, s. 25, an almost similar clause to the above enactment, the defendant was asked in cross-examination whether there had not been proceedings against him in the County Court at the suit of one Agutta in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury notwithstanding found their verdict for the then plaintiff, and it was objected that the question could not be put without producing the record of the proceedings in the County Court; and the objection was overruled, and the defendant answered that there had been such proceedings, in which he had given evidence, and that he had lost the verdict; the Court held that no new trial ought to be granted by reason of this question having been allowed, and said, 'We dissent from the *obiter dictum* of Cresswell, J., in *Macdonnell v. Evans*, as to what stands upon the same ground, viz., the necessity of producing the record of the conviction in order to found the question, on cross-examination, "Have you been convicted?" Upon a question collateral to the issue, as a rule, the questioner is bound by the answer; so that extraneous evidence is vain. Either the witness answers, "I have been convicted," and the question is useless, or he denies it, and then (apart from the Common Law Procedure Act 1845, s. 25, which does not touch this case) the proof of the conviction is forbidden. It cannot be given in evidence before the witness has answered, for it is not evidence in the cause. It could not be given in evidence after, because the answer is conclusive; and so of the proceedings in the county court in the present case. The case of *Macdonnell v. Evans*, the *Queen's case*, (c) and numerous other cases, in which it has been held that documents must be produced, are cases in which either the document would have been evidence upon the issue, or to contradict the witness if he answered in a particular way, or in which the precise terms and language of the documents were necessary to be referred to in order to answer the

(a) *R. v. Garbett*, 1 Den. C. C. 236.

(c) 2 B. & B. 288, 292.

(b) This section is almost the same as the C. L. P. Act, 1854, s. 25.

question. This is not a question as to the contents of a written document.' (d)

Where a witness called for plaintiff was asked on cross-examination by the defendant's counsel, who produced a letter purporting to be written by the witness, 'Did you not write that letter in answer to a letter charging you with forgery?' it was held that the question could not be put. The rule is that the best evidence in the possession or power of the party must be produced. Generally the original document is the best evidence; but circumstances may arise in which secondary evidence of its contents may be given. In this case these circumstances did not exist. For anything that appeared, the defendant's counsel might have the letter in his hand when he put the question. It was sought to give evidence of a letter without in any way accounting for its absence, or shewing any attempt made to obtain it. The best evidence of the document was not tendered. (e)

2ndly. The credit of a witness may be impeached by giving evidence of his having said or written touching the cause what is at variance and inconsistent with his testimony on the trial. (f) But in order to lay a foundation for such discrediting evidence, it is necessary first to ask the witness, when it is proposed to discredit by proof of contradictory verbal statements, upon cross-examination, whether he has made the statement or declaration, or held the conversation which it is intended to prove. (g) Thus if a witness, on being examined in chief as to some transaction supposed to have

(d) *Henman v. Lester*, 12 C. B. (N. S.) 776. Byles, J., *dissentiente*.

(e) *Macdonnell v. Evans*, 11 C. B. 930. The Court, however, studiously guarded against laying down any general rule, *Jervis, C. J.*, saying, 'It is unnecessary, as it seems to me, for the Court to lay down any general rule upon this subject.' During the argument, *Maule, J.*, said, 'If you want the jury to know that there was a letter containing a charge of forgery, the proper way to do so is by producing the letter itself;' and again, 'Suppose the witness had said, "I did write this letter in answer to another which is in Court," good sense obviously requires that the letter should be produced, if it is wished to get at its contents;' and in giving judgment, 'Suppose we assume that the paper was shewn to the witness, and he was asked, "Did you not say 'Yes' in answer to something contained therein?" can it be contended that the contents of the paper could not be shewn? It seems to me that if the document was present, the proper way of dealing with it would be to produce it, and then to ask the witness, "Did you not write so and so in answer to it?"' The Court treated the question in this case exactly the same as if it had arisen on an examination

in chief. In *Boosey v. Davidson*, 13 Q. B. 257, which was an action for the infringement of a copyright of certain airs in an opera, a witness was asked whether he had not seen printed copies of these airs in a particular shop; and it was held that the question could not be put, as the answer would be a statement of the contents of a written instrument, without accounting for its non-production.

(f) *De Saily v. Morgan*, 2 Esp. N. P. C. 691. *Christian v. Combe*, 2 Esp. 489. See *ante*, p. 564, as to the depositions of a witness before a magistrate being used for this purpose. In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving that on an information before two magistrates against the same defendant for having smuggled goods in his possession he gave a different account of the matter, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said. *R. v. Howe*, 1 Campb. 461. S. C. 6 Esp. 125.<sup>1</sup>

(g) *The Queen's case*, 2 B. & B. 299. *Carpenter v. Wall*, 11 A. & E. 803.

#### AMERICAN NOTE.

<sup>1</sup> See *Fogleman v. S.*, 32 Ind. 145. *S. v. Noyes*, 36 Conn. 80. *C. v. Mead*, 12 Gray, 167. *Wormely v. C.*, 10 Gratt. 658. *S. v. McQueen*, 1 Jones (Law), 177. *P. v. Robles*,

29 Cal. 421. *P. v. Austin*, 1 Parker, C. R. 154. *Pleasant v. S.*, 15 Ark. 624. *Tucker v. Welsh*, 17 Mass. 160. *Jones v. S.*, 4 Engl. 42. *Regnier v. Cabot*, 2 Gilm. 34.

occurred between certain persons, should admit that he had heard of such a thing, but does not know its cause, it would be irregular to prove his having made a declaration respecting the cause, in order to shew his knowledge of the cause, without first asking him in the cross-examination whether he had not made such a declaration; or if he had answered that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction for the purpose of shewing that he must have remembered it: (*h*) for it would, in many cases, have an unfair effect upon the witness and upon his credit, and would deprive him of that reasonable protection which it is the duty of the Court to afford to every person who appears as a witness, to allow proof of his former conversation without first interrogating him as to that conversation, and reminding him of it, in order to call up all the powers of his memory as to the transaction. (*i*) And it is not enough to ask the general question, whether the witness has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having said so; but the witness must be asked as to the time, place, and person involved in the supposed contradiction; because, when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. Where, therefore, a witness had denied that he had ever said that he was in partnership with the defendant, but had not been questioned as to the particular person, or conversation; Tindal, C. J., refused to allow a witness to be asked whether on a particular occasion the witness had told him that he was in partnership with the defendant. (*j*)

By the 28 & 29 Vict. c. 18, s. 5, (*k*) 'a witness may be cross-

(*h*) The Queen's case, 2 B. & B. 299.

(*i*) 2 B. & B. 300. Abbott, C. J., in delivering the opinion of the judges, added that, in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation, the Court would, of its own authority, call back the witness in order to give him an opportunity of doing so. Another reason why he ought to be cross-examined is, that he may have an opportunity of explaining his conduct, 2 B. & B. 314.

(*j*) *Angus v. Smith*, M. & M. 473. The witness was allowed to be recalled, and asked the particular question; and the same rule was laid down by Parke, B., in *Crowley v. Page*, 7 C. & P. 789, *post*, p. 630, note (*v*), and in *R. v. Pearce*, Gloucester Spr. Ass. 1829, MSS. C. S. G. Learned judges have in many instances allowed witnesses to be recalled in order to lay a foundation for the admission of such contradictory evidence. In *R. v. Harris*, Salop Spr. Ass. 1842, upon an indictment for murder, the prisoner had no counsel, and in his defence to the jury he alleged certain statements to have been made by the principal witness for the prosecution, and imputed that his son, who could prove the statements, had been prevented from attending to give evidence for him; and Patte-

son, J., stopped the trial, and ordered the son to be sent for, at the same time directing that no communication should be made to him of the matters as to which he was going to be examined. The prisoner having no attorney, and the son not having been examined by any one as to what statements he had heard the witness make, a difficulty arose as to the mode which was best to be adopted in the examination of the son, and the cross-examination of the witness, and the following mode was adopted as the best under the peculiar circumstances of the case:—The son was first examined by the editor, at the request of the learned judge, as to what he had heard the witness say, the witness being kept out of Court during such examination, and then the witness was called in and cross-examined by the editor as to the statements which the son had sworn that he had made. The jury acquitted the prisoner, although the evidence for the prosecution was very strong. This case has been mentioned, as it may serve as a guide for the practice in cases where the prisoner wishes to call witnesses to prove contradictory statements made by witnesses for the prosecution, without having laid the ground for so doing in a proper manner. C. S. G.

(*k*) As to the practice on this subject before this Act, see the Queen's case, 2 B. &

examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, without such writing being shewn to him; but if it is intended to contradict such witness by the writing, (1) his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.' This clause, by sec. 1, applies to 'all Courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence;' and consequently any Court of sessions trying any offence, or any justice or justices hearing any charge of any offence, may require the production of any writing, &c., though the word 'judge' alone occurs in the clause.

This 5th section is the same in substance as the 17 & 18 Vict. c. 125 (The Common Law Procedure Act 1854) s. 24. As it is obvious that some questions are likely to arise upon this 5th section, it may be well to advert to them. The clause seems to assume that the writing is in the possession of the party who is cross-examining, and where that is the case, no difficulty as to its production can arise. But the writing may not be in his possession, and, in the most common cases in criminal trials, the depositions are in the custody of the Court. Here however, also, no difficulty can arise, as the Court will, no doubt, always permit or cause them to be used for the purpose of the clause. But the writing may be in the custody of other parties, and several questions may arise where that is the case. It may be in the custody of the prisoner, and notice to produce it may have been given, or it may be in the custody of a third party who has been subpœnaed; in either of these cases it is apprehended that the cross-examining party is entitled to prove the notice, and to call for the writing, or to call on the party subpœnaed to produce the writing: and it is now clearly settled that such a course ought at once to be adopted, and not postponed till the cross-examining party enters on his case. (m)

If the document be obtained in either of these modes, no difficulty will occur; but it may be that it may not be produced, though it is shewn to be in the custody of the prisoner or witness. The question will then arise whether the judge has power to compel its production; the words 'it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection,' are perfectly general, and, if they stood alone, would seem to give the

B. 286. If counsel suggests to the Court that he wishes to have a letter written by a witness read immediately in order to found certain questions upon its contents, that cannot be well or effectually done without reading the letter itself; in that case, for the more convenient administration of justice, the letter is permitted to be read, but considering it as part of the evidence of the counsel proposing it, and subject to all the consequences of its being so considered.

Ibid. 289, 290. When a letter is produced, the Court will allow a witness to be asked, upon shewing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part. Ib.

(1) In order to contradict by the writing, it must be put in as evidence. *R. v. Riley*, 4 F. & F. 964; *R. v. Wright*, 4 F. & F. 967.

(m) *Boyle v. Wiseman*, 11 Exch. R. 360, and other cases, *post*, p. 671.

judge such power; but they occur in the proviso to the preceding part of the clause, which seems plainly to contemplate that the document is in the hands of the cross-examining party: and they seem to have been introduced for the purpose of enabling the judge to prevent an improper impression being produced by a partial communication of the contents of the writing; and, therefore, it admits of serious doubt whether it would be held that the judge was empowered in such a case by this clause to compel the production of the writing. Then, suppose the writing not to be attainable in these cases, or that it is in the possession of some person who has not been subpoenaed to produce it, and is not present; in such a case, as the power to cross-examine as to any writing is given in perfectly general terms, there seems no doubt that the right to cross-examine would exist; but as, before any contradictory proof can be given, the attention of the witness is to be called to the parts of the writing, (*n*) it seems to be clear that in such a case no contradictory proof will be admissible.

Lastly, if a paper written by the witness is proved to have been lost or destroyed (in which case the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the paper), the counsel may cross-examine the witness as to the contents of such paper, (*o*) and this might be done before the Act. Thus where on the trial of an indictment which had been found at the Monmouth Special Commission, it was proved that at that Commission the depositions of the witnesses had been frequently produced, and that they had been mislaid, and that diligent search had been made for them several times, and they could not be found; Patteson, J., held that a witness might be cross-examined as to what he had said before the magistrates by a copy of the depositions, which was proved to be a correct copy. (*p*)

A witness, who has been examined before commissioners in a bankruptcy, may be asked whether he had mentioned a fact, which he had just mentioned, before the commissioners, without putting his examination into his hand, as the object is to shew that he did not mention the fact, and he may admit that if he chooses; if he does not ask for the examination to refresh his memory, he may answer without it if he chooses. (*q*)

It was once said that, if the counsel who cross-examines puts a paper into the witness's hand, and puts questions on it, and anything comes of the questions founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it; but if the cross-examination founded on the paper entirely fails, the opposite counsel has no right to look at it. (*r*) But it has since been laid down that whenever counsel puts a document into the hands of a witness, and asks him whether it is in his handwriting, and then proceeds to found any question on such document, the counsel on the opposite side has a right to see it; and the only case in which the opposite counsel has not this right is where counsel, after handing the document to

(*n*) See *Sladden v. Sergeant*, 1 F. & F. 322.

(*o*) 2 Phill. Ev. 439.

(*p*) *R. v. Shellard*, 9 C. & P. 277.

(*q*) *Ridley v. Gyde*, 1 M. & Rob. 197, Tindal, C. J.

(*r*) *R. v. Duncombe*, 8 C. & P. 369, Lord Denman, C. J.

the witness (and asking him whether it is his handwriting), goes no further. (s)

If a letter or other writing be tendered in evidence for the purpose of contradicting a witness, and a question is raised whether it was written by the party, it is for the judge to determine that question. (t)

Since the 28 Vict. c. 18, s. 5, it seems that the rules laid down by the judges as to the mode of cross-examining witnesses for the Crown with respect to what they have previously sworn before the magistrate, and which has been reduced into writing in their depositions, are no longer in force. (u)

The rules, which it seems applied to depositions before a coroner, (v) will be found in 7 C. & P. 676. (w)

Before the above Act some cases occurred in which the counsel for the prisoner, on cross-examining a witness for the prosecution, offered to put into his hand his deposition, and then proposed to ask him whether, having looked at the paper, he still persevered in the statement already made in his evidence in Court; Parke, B., and Coltman, J., had some doubt as to the propriety of this course; but, it having been permitted by some judges, they thought it right to allow it. They, however, asked the opinion of the judges whether they were right, and the judges were of opinion that the course pursued was inexpedient, and that it ought not to be allowed in future. (x)

In one case, before the above Act, it seems to have been considered

(s) Per Erle, J., in *Cope v. The Thames Haven Dock Company*, 2 C. & K. 757. The words between brackets are inserted from the marginal note, and render the passage consistent with the regular practice.

(t) *Cooper v. Dawson*, 1 F. & F. 550. *Wightman, J. Boyle v. Wiseman*, 11 Exch. R. 360.

(u) As to the practice before the above Act, see *R. v. Taylor*, 8 C. & P. 726; *R. v. Holden*, 8 C. & P. 606; *R. v. Edwards*, 8 C. & P. 26; *R. v. Price*, 7 Cox, C. C. 405; *R. v. Moir*, 4 Cox, C. C. 279; *R. v. Newton*, 4 Cox, C. C. 262; *R. v. Edwards*, 8 C. & P. 26; *R. v. Curtis*, 2 C. & K. 763; *R. v. Peel*, 2 F. & F. 21.

(v) *R. v. Barnett*, 4 Cox, C. C. 269; but see *R. v. Maloney*, 9 Cox, C. C. 26.

(w) These rules are: 1. That where a witness for the Crown has made a deposition before a magistrate, he cannot, on his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. 2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the

witness, and, after the prisoner's counsel has addressed the jury, will be entitled to reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it. 3. That the witness cannot, in cross-examination, be compelled to answer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, the counsel for the prisoner may proceed with his cross-examination, and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effects of it upon the other part of his testimony; or, if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

(x) Anonymous, cited in *R. v. Ford*, 2 Den. C. C. 245, from the MSS. of Parke, B. April, 1843. *R. v. Ford*, 2 Den. C. C. 245. 5 Cox, C. C. 184. Spring Ass. 1851. *R. v. Palmer*, 5 Cox, C. C. 236. Pollock, C. B. S. P. April, 1851. *R. v. Brewer*, C. C. 409, S. P. Blackburn, J., Jan. 1863.

a fitting course for the judge to look at the depositions while the witnesses were under examination, and question them as to any discrepancy between them and their evidence; (y) but in other cases learned judges have refused, where counsel were employed by the prisoner, to look at the depositions at all. (z)

Where before the above Act, the deposition was put in the hands of a witness, and on being asked to read it he said he could not read writing, it was held that there was no objection to the deposition being read over to him, and the officer of the Court read it over to him accordingly. (a)

In a case, before the above Act, where it was proved that the depositions had been regularly taken against the prisoner before the magistrates, and returned to the proper officer, and that officer proved that he had made diligent search after them, and could not find them; Patteson, J., held that the prisoner's counsel might cross-examine from copies of them, which were proved by the magistrate's clerk to be correct. (b)

The same rule applies as to the cross-examination of a witness on his deposition by the counsel for the Crown as by the counsel for the prisoner. (c)

In a case, before the above Act, where, when the prisoners were first brought before the magistrate charged with the felony, the witnesses were sworn, examined by the magistrate, and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk to the magistrates under the inspection of the magistrates, these minutes were then sent to the office of the clerk to the magistrates, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the minutes. The witnesses attended in the office, and in the course of writing the depositions Tasker put some questions to each of them, for the purpose of rendering the depositions more correct, clear, and complete. The answers given to these questions were inserted in the depositions. The magistrate was not present, nor were the prisoners at the office of the clerk to the magistrates. The depositions having been thus written, the witnesses appeared again before the magistrates, and in the presence of the prisoners were resworn; the depositions were read over to them, and a full opportunity was afforded for cross-examination before the depositions were signed by the witnesses. Upon these circumstances appearing on the trial, the counsel for the prisoners proposed to ask one of the witnesses for the Crown this question, 'Did you not tell Mr. Tasker that you

(y) *R. v. Edwards*, *supra*. This is a course which has not unfrequently been adopted in cases where the prisoner has had no counsel, and in such cases it appears highly expedient, as prisoners rarely have copies of the depositions unless they are defended by counsel, and, even if they had, probably would not be able properly to avail themselves of any contradictions that might arise; and it is to be remembered that the depositions are returned to the judge for the express purpose of enabling him to judge as to the accuracy of the witnesses. C. S. G.

(z) *R. v. Thomas*, 7 C. & P. 817. Parke, B., as stated 8 C. & P. 27, and that statement is correct. *R. v. Holden*, 8 C. & P. 606.

(a) *R. v. Edwards*, 8 C. & P. 26. Little-dale and Coleridge, JJ. But see *R. v. Tooker*, 4 Cox, 93 (b). *R. v. Matthews*, 4 Cox, C. C. 93, August, 1849. Probably this case is inaccurately reported. See *R. v. Ford*, *supra*.

(b) *R. v. Shellard*, 9 C. & P. 277.

(c) *R. v. Muller*, 10 Cox, C. C. 43. Pollock, C. B., and Martin, B.

were watching the prisoner Christopher till a quarter before one o'clock?' The question was material, and had reference to what was said by the witness in answer to some question put by Tasker, as above stated, in the course of writing the depositions, and the witness's answer would, according to the evidence, appear on the depositions. The depositions were not read or tendered in evidence. The question was overruled by the Court; and it was contended, on a case reserved, that if it were a legal deposition, it only excluded an inquiry into what took place before the magistrate. It was answered that, if Tasker had taken down the answers, and the witness had signed them, that paper would exclude evidence of what was said, and that it was like a statement contained in a letter. (*d*) Wilde, C. J., 'We think the question proper and legal, and that an answer should have been required. It is objected that the answer was to be found in a paper signed by the witness, which must be regarded as a deposition, having acquired that character from the circumstances under which it was made. But the ground upon which a deposition is exclusive evidence of a matter contained in it, is the presumption that the magistrate has done his duty, and taken down all that was material in the testimony of the witness. But Tasker was a mere stranger; he could not, by any act of his, attach to the writing a character which would exclude parol evidence of what was so written; it does not become primary evidence of such matter: the witness's own words are the primary evidence of the statement. Suppose the witness had said something, and had then written it down himself, his writing would not exclude his speech. Why then should Tasker's writing do so? The whole argument was founded on an incorrect analogy. The conviction, therefore, was wrong.' (*e*)

In order to lay a foundation for contradicting a witness, the questions asked upon cross-examination must, in some way, be relevant to the matter in issue. Thus in an action for usury, the person with whom the contract, alleged to be usurious, had been made, was produced as a witness for the plaintiff, and the counsel for the defendant proposed to cross-examine him as to other contracts he had made with other persons, which were not usurious; intending, if the witness answered in the affirmative, to draw the conclusion that he had made the same contract with the defendant, and if the witness denied the nature of those other contracts, to call evidence to prove the contrary, and thereby destroy the witness's credit. But Lord Ellenborough refused to suffer the question to be put, conceiving it to be entirely irrelevant to the issue in the cause; and the Court of King's Bench were afterwards all of opinion that he had acted properly; and they laid down the rule, that it is not competent for counsel on cross-examination to question the witness concerning a distinct collateral fact, which, if answered affirmatively, is wholly irrelevant to the matter in issue, for the purpose of

(*d*) It was also contended that the deposition was not a legal deposition at all; but no opinion was pronounced on this objection.

(*e*) *R. v. Christopher*, 1 Den. C. C. 536. In the course of the argument Maule, J., said, 'Tasker usurped an authority. He can

no more exclude parol evidence of the witness's statement by reducing it to writing than any one present at a seditious meeting can exclude parol evidence of words there spoken by choosing to make a memorandum of them.'



discrediting him, if he answers in the negative, by calling other witnesses to contradict him. (*f*) It need hardly be observed, if a question be wholly irrelevant, and therefore improperly asked on cross-examination, and the witness nevertheless give an answer to it, the cross-examining party may not call evidence to contradict that answer; but it is further to be remarked, that many questions may be asked with propriety on cross-examination, which are irrelevant to the matter in issue, yet are allowable because they go to the credit of the witness; but the distinction is, as to the right to call evidence to contradict answers given to questions put to shake a witness's credit, that if the questions go merely to his credit, and are in other respects collateral to the issue, evidence cannot be called to contradict the answers; if they not only go to his credit, but are also connected with the subject of inquiry, then it is allowable to call witnesses to contradict. Thus if a witness be asked, on cross-examination, whether he has been guilty of a crime, or any conduct which would discredit him as a witness, but is unconnected with the matters in issue, and he denies it, his answer is conclusive. (*g*)

So where on the trial of an information charging a malster with having used a cistern for making malt without having previously entered it, a witness was asked on cross-examination whether he had not said that the officers of the Crown had offered him £20 to say that the cistern had been used, and he denied having said so; it was held that evidence was inadmissible to prove that he had said so; for the contradiction would be on a matter wholly irrelevant, and would in no way affect the character of the witness. (*h*)

Where on a trial for rape the prisoner called a witness, who stated that he could not speak English, and was accordingly sworn and examined in Irish, through an interpreter, and on cross-examination he again denied that he could speak English, and he also denied that he had spoken in English to two girls within the last few days, and these girls were called, and proved that he had so spoken to them in English; upon a case reserved, it was held that the evidence of these girls ought not to have been admitted. (*i*) But

(*f*) *Spencely v. De Willott*, 7 East, R. 108. It seems that the new Act has not limited the right of a party calling a witness to contradict him on facts relative to the issue, *Greenough v. Eccles*, 28 L. J. C. P. 160, 5 C. B. N. S. 786.

(*g*) *Ante*, p. 618.

(*h*) *A. G. v. Hitchcock*, 1 Exch. R. 91. Pollock, C. B., said, 'The test whether the matter is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence — if it have such a connection with the issue that you would be allowed to give it in evidence — then it is a matter on which you may contradict him. [But this seems to be much too narrow a rule, and so said O'Brien, J., in *R. v. Burke*, *infra*.] If you ask a witness whether he has not said so and so, and the matter he is supposed to have said, would, if he had said it, contradict any other part of his testimony, then you may

call another witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness box is not true (more accurately, in order that the jury may disbelieve or doubt the statement of the witness) It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry.' The editor has inserted the parts between brackets. C. S. G.

(*i*) *R. v. Burke*, 8 Cox, C. C. 44. Three judges thought the evidence rightly received.

where a woman, who was the only witness to prove an abominable offence, swore that she did not know the prisoner previously, evidence was admitted that they knew each other well, and were, in fact, intimately acquainted. (*j*)

Upon a trial for murder in Ireland, a witness identified the prisoner, and was cross-examined as to whether he had not stated that the prisoner was not the man. This he denied. The prisoner called A. and B. to prove that the witness had said to them that the prisoner was not the man. The prosecution were allowed to call C. and D., who were present at the alleged conversation with A. and B., to contradict them, and support the witness; but in the same case, a police constable having stated that a witness who identified the prisoner had previously told him that he could not identify him, and having said on cross-examination that he had reported this to his superior officers, May, C. J., refused to allow the superior officers to be called to rebut this statement. (*k*)

Where in an action on a joint and several promissory note made by the father and grandfather of the defendant, who was sued as the administrator of his grandfather, the defence was that the plaintiff had forged the note in question, and also another note, in order to cover the forgery of the first note, and a charge had been preferred against the plaintiff for the forgery before the magistrates, but dismissed; the defendant was examined as a witness, and was asked on cross-examination whether his father had not, after the charge was preferred against the plaintiff, said in his presence that 'he was sorry he had forgotten that he had signed two notes.' The defendant answered in the negative. It was held that the plaintiff's counsel could not call a witness, in whose presence the father had made the statement, for the purpose of shewing that the father had made the statement, and that the defendant had heard it; for the issue sought to be raised was purely collateral. (*l*) So where in an action for an assault on the plaintiff's wife, she swore that the assault was of an indecent character; the defendant denied it, and on cross-examination denied other indecent assaults on some young persons; and evidence on the part of the defendant was tendered to disprove these imputations, which was objected to unless evidence was admitted in support of them; it was held that such evidence on the one side or the other was inadmissible, as the matter inquired into was quite collateral to the issue to be tried. (*m*)

It is allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and

(*j*) *R. v. Dennis*, 3 F. & F. 502. The admissibility of the evidence was not disputed, and Byles, J., left it to the jury in favour of the prisoner.

(*k*) *R. v. Whelan*, 14 Cox, C. C. 595. The proper test appears to be whether the evidence is relevant or irrelevant, and the question is not one merely for the discretion of the judge and therefore it would seem that the latter ruling of May, C. J., cannot be supported. See *R. v. Shaw*, 16 Cox, C. C. 503.

(*l*) *Palmer v. Trower*, 8 Exch. R. 247. Alderson, B., said, 'It is a statement made in the presence of the defendant of a fact not within his own knowledge; if it had been made in the presence of the grandfather, who is represented by the defendant, the case might have been different.'

(*m*) *Tolman v. Johnstone*, 2 F. & F. 66, Cockburn, C. J., after consulting the other judges of Q. B.

prevent him from having an unprejudiced state of mind, and whether he has not used expressions imputing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other; and if he denies it, evidence may be given as to what he said, not with the view of having a direct effect, but to shew what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed. (n) Where, therefore, in an action on a promissory note (in which the defence appears to have been that the note was forged), the female servant of the plaintiff, who was one of the attesting witnesses to the note, was asked on cross-examination whether she did not constantly sleep in the same bed with the plaintiff, which she denied; Coleridge, J., held that a witness might be called by the defendant to contradict her; as the question was whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery: just in the same way as if she had been asked if she was the sister or daughter of the plaintiff, and had denied that. But if the question had been whether the witness had walked the streets as a common prostitute, that would have been a collateral issue, and, if she had denied it, she could not have been contradicted. (o)

If the imputed misconduct be relative to the subject of inquiry, as, if a witness for the Crown be asked whether he had not said that he would be revenged on the prisoner, and would soon fix him in gaol, (p) or whether he had not made declarations to procure persons corruptly to give evidence in support of the prosecution, (q) then evidence may be called to contradict him, if he denies the words or declaration imputed to him. Thus where on an indictment for an indecent assault on a girl, another girl denied in cross-examination that two letters were in her handwriting; and on the part of the prisoner, the suggestion was that the charge was the result of a conspiracy among the children and their parents; it was held that it might be proved that these letters were in the handwriting of the girl, and that the letters might be read; but that they were only evidence for the purpose of detracting from the credit of the girl. (r)

Where on one trial the jury were discharged, and on the second trial a witness admitted in cross-examination that she had been in England and had prosecuted for a felony; it was held that it might be proved that on the former trial she had denied that she had ever been in England or had prosecuted there; for, no matter whether the question was relevant or irrelevant to the present issue, it went to the consistency of her evidence on the two trials. (s)

(n) Per Pollock, C. B., *A. G. v. Hitchcock*, *supra*.

(o) *Thomas v. David*, 7 C. & P. 350. In *Melhuish v. Collier*, 15 Q. B. 883, Coleridge, J., said, 'The principle I went upon in *Thomas v. David* was that the fact was one that the defendant might have proved in chief.'

(p) *Yewin's case*, 2 Campb. 688.

(q) *The Queen's case*, 2 B. & B. 311.

(r) *R. v. M'Gavaran*, 6 Cox, C. C. 64. Williams, J. The letters spoke of sticking to the charge made against the prisoners, but there was no proof that they had been delivered to the persons to whom they were addressed.

(s) *R. v. Rorke*, 6 Cox, C. C. 196. *Lefroy and Monahan*, C. JJ.

If the witness declines to give any answer to such a question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot be compelled to answer, the adverse party has also, in this instance, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. (*t*)

In one case, where a witness said on cross-examination that he had no recollection of a certain declaration one way or the other, without expressly denying it; Tindal, C. J., held that a person could not be called to prove such declaration; as he had never heard such evidence admitted in contradiction, except when the witness had expressly denied the declaration. (*u*) But in a later case where a witness neither admitted nor denied a verbal statement relevant to the matter at issue; Parke, B., held that evidence was admissible to shew that the witness had made such a statement. (*v*)

And now by the 28 & 29 Vict. c. 18, s. 4, 'if a witness on cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.' (*w*)

3rdly. The credit of a witness may be impeached, not only by giving evidence to prove statements made by him at variance with his testimony, but by calling witnesses to prove his declarations and acts touching the subject-matter of inquiry. (*x*) And the rules above stated, as to the necessity of a previous cross-examination of the witness whom it is proposed to discredit, apply equally to this method of discrediting him as to the last. So that if it is intended to offer evidence of former declarations of a witness, or of acts done by him,

(*t*) The Queen's case, 2 B. & B. 313, 314.

(*u*) Paine v. Beeston, 1 M. & Rob. 20.

(*v*) Crowley v. Page, 7 C. & P. 789. The learned Baron said, 'Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible, in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or

some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so you could never contradict a witness who said he could not remember.'

(*w*) This section is similar to the C. L. P. Act, 1854, s. 23. See Ryberg v. Ryberg, 32 L. J. P. M. & A. 112.

(*x*) The Queen's case, 2 B. & B. 311.<sup>1</sup>

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<sup>1</sup> See Sealy v. S., 1 Geo. 220. S. v. Jefferson, 6 Ired. 305. Clarke v. S., 8 Humph. 671. S. v. Peace, 1 Jones (Law), 251. S. v.

Schoenwald, 31 Mo. 147. Callahan v. Shaw, 24 Iowa, 441. S. v. Smith, 8 Jones (Law), 137. C. v. Billings, 97 Mass. 405.

though not with a view to contradict his statement upon oath in examination in chief, but with a view of discrediting him as a corrupt witness; in this case also it has been determined that the witness should be previously questioned as to such declarations, or such acts, on the cross-examination; (y) for in the one case as well as the other an opportunity must be afforded the witness of explaining his conduct before evidence can be adduced to impeach his credit by proof of the fact. Thus where the witness's moral character is relevant to the issue, expressions of the witness may be proved without the previous inquiry, if they tend merely to disgrace the witness by shewing that he has made unbecoming declarations; but even if they be of such a nature, the introductory question must not be dispensed with, if they tend likewise to contradict some part of the witness's evidence. Therefore in an action for seducing the plaintiff's daughter, which the daughter proves, the defendant cannot give evidence that she has talked of another person as her seducer and the father of her child, unless she be first asked on cross-examination whether she ever used those expressions. (z)

After a witness had been cross-examined respecting his former statements and declarations, for the purpose of affecting his credit, the counsel who called him has a right to re-examine him so as to give him an opportunity of explaining such statements and declarations. Thus if that which the witness has stated in answer to the question on his cross-examination arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in re-examination what those inquiries were. (a) And he may also be asked what induced him to give to that person the account which he has stated in the cross-examination. (b)

But this, it should seem, is the limit of such a re-examination. Abbott, C. J., in delivering his opinion in the *Queen's case*, said, 'I think the counsel has a right, upon a re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and, also, of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.' (c)

His lordship afterwards observed, 'I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are, in themselves, evidence against him in the suit and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon

(y) 2 B. &amp; B. 311.

(z) *Carpenter v. Wall*, *supra*, 11 A. & E.

803.

(a) 2 B. &amp; B. 295.

(b) *Ibid.*

(c) 2 B. &amp; B. 297.

the previous examination: provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may shew the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent.' (d)

But the reasoning and the grounds of the supposed distinction have been since considered by the Court of Queen's Bench, and after full consideration that Court overruled the distinction, and adopted the more safe and intelligible principle that the office of re-examination is to be confined to shewing the true colour and bearing of the matter elicited by cross-examination, and that new facts or new statements, not tending to explain the witness's previous answers, ought not to be admitted. (e)

Thus where an accomplice being cross-examined with a view to throw discredit on his testimony, confessed that he had committed two robberies the same night as the one charged in the indictment, and on re-examination it was proposed to ask him as to the particular circumstances attending those robberies, and the persons in whose company they were committed, in order to shew that the prisoners were the persons; Littledale, J., refused to allow it, observing that the cross-examination having been only with a view to the witness's discredit, it was not competent to the counsel for the prosecution, on re-examination, to ask questions not arising out of such cross-examination, in order to criminate the prisoners. (f)

4thly. The credit of a witness may be impeached by proof of his general character.<sup>1</sup> It is now completely settled with respect to

(d) 2 B. & B. 297, 298. The other judges, except Best, J., agreed with the Lord Chief Justice; but the Lord Chancellor and Lord Redesdale were of the same opinion with Best, J., and differed from the other judges, inasmuch as they thought that the entire conversation ought to be admitted, not as evidence of any fact that might be asserted in the course of it, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

(e) 2 Phil. Ev. 443, citing *Prince v. Samo*, 7 A. & E. 627, where in an action for a malicious arrest, a witness called for the

plaintiff stated on cross-examination that the plaintiff had instituted a prosecution for perjury against a witness examined against him in the action in which he had been arrested, and that the plaintiff had said that he had been remanded by the Insolvent Debtors' Court; on his re-examination it was proposed to ask him whether the plaintiff had not also, on the trial of the indictment, sworn that the advance in question was a gift and not a loan; but Lord Denman, C. J., ruled that the question could not be put, and the court held that the ruling was right.

(f) *Fletcher's case*, 1 Lew. 111.

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<sup>1</sup> See *Frye v. Bank*, 11 Ill. 367. *S. v. Smith*, 7 Verm. 14. *Wilson v. S.*, 10 Ind. 392. *S. v. Randolph*, 24 Conn. 363. *Stokes v. S.*, 13 Geo. 17. *Craig v. S.*, 5 Ohio (N.S.), 605. *S. v. Parish*, 22 Iowa, 284. *S. v. Dove*,

10 Ired. 469. *Uhl v. C.*, 6 Gratt. 706. *S. v. Moore*, 25 Iowa, 128. *P. v. Yslas*, 27 Cal. 630. As to evidence of good character, *Starks v. P.*, 5 Denio, 106. *Merriam v. Railroad Co.*, 20 Conn. 354.

this mode of discrediting a witness, that general evidence only, and not evidence as to particular facts, can be employed; (g) for if it were allowable to give evidence of particular collateral facts to affect his credit, the inquiry might branch out into an indefinite number of issues. Besides which, although a witness may be supposed capable of defending his general character, no man can come prepared to give an answer to particular facts, which might be sworn against him to impeach his character, without any previous notice given to him. (h) The proper mode, therefore, of examining a witness, who is called to discredit a previous witness by proof of his character, is to ask whether the present witness has had the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath. (i) In order to answer this question negatively it is not necessary that the witness should ever have heard such person give evidence on oath, as the real question is whether the witness has such a knowledge of the person's character and conduct as enables him conscientiously to say that it is impossible to place any reliance on any statement that such person may make. (j) It has been held upon an indictment for perjury that a witness for the defendant could not be asked whether, from having heard a witness for the prosecution give evidence on the trial of a former cause, he considered that the testimony of that witness could be relied on; nor whether he ever heard him commit perjury; nor whether he would not believe the witness because he had heard him commit perjury; as the witness must speak for the general character. (k)

Where upon an indictment for stealing money it was opened on the part of the Crown that an accomplice and one Mercer would be called as witnesses; Park, J., both before and after those persons were called, allowed the prisoner's counsel to ask the other witnesses for the prosecution whether the accomplice and Mercer were not persons of very bad character. (l)

In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge, and the grounds of his opinion, or may attack his general character. (m)

Where a witness on cross-examination stated that he had become bail for a witness who had been previously examined, and he believed it was on a charge of keeping a gaming-house; in order to prevent any impression being thereby made against the character of the previous witness, Gaselee, J., and Taunton, J., allowed the previous witness to be recalled, and asked whether the charge of keeping the gaming-house was in fact a true charge or not. (n)

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses. (o)

(g) *R. v. Watson*, 2 Stark. N. P. C. 149.  
Bull. N. P. 296. 2 Phill. Ev. 430. 1 Stark. Ev. 237.

(h) Bull. N. P. 296.

(i) *Mawson v. Hartsink*, 4 Esp. N. P. C. 102. *R. v. Brown*, 36 L. J. M. C. 59; 10 Cox, C. C. 453.

(j) *R. v. Bispham*, 4 C. & P. 392. Parke, J., and Garrow, B.

(k) *R. v. Hemp*, 5 C. & P. 463. Lord Denman, C. J.

(l) *R. v. Nichols*, 5 C. & P. 600.

(m) 1 Stark. Ev. 238.

(n) *R. v. Noel*, 6 C. & P. 336.

(o) *Bishop of Durham v. Beamont*, 1 Campb. 207. 1 Stark. Ev. 252.

Thus in a case where a witness for one party asserts one thing, and a witness for the other party asserts the contrary, and direct fraud is not imputed to either, evidence to the good character of either witness is not admissible. (*p*) But if the character of a witness has been impeached (although, according to some authorities, upon cross-examination only), evidence on the other side may be given in support of the character of the witness by general evidence of good conduct. (*q*) So in a case where two attesting witnesses to a will, which was impeached on account of fraud in procuring it, were dead, and a surviving attesting witness was called, and spoke to a fraudulent execution, it was held allowable to call evidence to the general good character of the deceased witnesses: (*r*) and Lord Ellenborough, in approving of that decision, observed, that if they had been alive they might have been produced, and their characters would have appeared on cross-examination; and being dead, justice required that an opportunity should be given of shewing what credit was to be given to their attestation. (*s*) Whether in answer to proof of statements made by a witness in variance with his testimony at the trial, evidence may be given by the party who called the witness, that he affirmed the same thing on other occasions, and is still consistent with himself, is a point on which there are conflicting authorities. (*t*) The better opinion seems to be that such evidence is not admissible, except in cases where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; there, in order to repel such imputation, it may be proper to shew that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. (*u*) Thus where Neville was indicted for perjury committed on the trial of Barnes for setting fire to a rick, and Heming swore that Barnes was with him at a distance from the rick, but on cross-examination admitted that, on the trial for arson, he had given a different account, which tended to support the charge against Barnes; he said, however, that the day after the fire he had told the facts to Morgan, a constable, as he now stated them, and that he had been induced to make a false statement on the trial for arson; it was held that Morgan might be called to prove that Heming had made a statement to him the day after the fire for the purpose of setting up the witness, but that the particulars of the statement could not be asked by the counsel for the Crown. (*v*)

Where in the course of a trial for rape a witness called by the prosecution stated in cross-examination that the prosecutrix had told her that the prisoner had hurt her with his finger, Day, J., after

(*p*) 1 Campb. 207.

(*q*) 1 Stark. Ev. 252. *Bate v. Hill*, 1 C. & P. 100. *R. v. Clarke*, 2 Stark. N. P. C. 241, where the prosecutrix, upon an indictment for an attempt to commit a rape, having been cross-examined as to having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution: *cor.* Holroyd, J.; but see *Dodd v. Norria*, 3 Campb. 519.

(*r*) By Lord Eldon in *Doe v. Stephen-*

*son*, 3 Esp. 284. By Lord Kenyon in *Doe v. Walker*, 4 Esp. 50. *Provis v. Reed*, 5 Bingh. R. 435.

(*s*) 1 Campb. 210.

(*t*) Gilb. Ev. 135. Bull. N. P. 294.

(*u*) 2 Phill. Ev. 445. 1 Stark. Ev. 253. See also the opinion expressed by Bayley, J., in *Wihen v. Law*, 3 Stark. N. P. C. 63. See also *ante*, Book v. chap. i. s. iii. Of *Hearsay Evidence*.

(*v*) *R. v. Neville*, 6 Cox, C. C. 69. Williams, J.



consulting Cave, J., allowed the counsel for the prosecution to ask the witness in re-examination, if she had not told the prosecutrix's mother that the prosecutrix had said to her that the prisoner had had forcible connection with her. (*w*)

By the 28 & 29 Vict. c. 18, s. 3, 'A party producing a witness shall not be allowed to impeach his character by general evidence of bad character, (*x*) but he may, in case the witness shall, in the opinion of the judge, prove adverse, (*y*) contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent (*z*) with his present testimony; (*a*) but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. (*b*)

If a witness gives evidence contrary to that which the party calling him expects, the party is at liberty to make out his own case by other witnesses, and to shew that the facts which his own witness had stated contrary to his interests were otherwise; (*c*) for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only. (*d*)

Before the above Act, upon an indictment for murder, the counsel for the prosecution at first declined examining the prisoner's mother, but the judge thought it right to have her examined (her name being on the back of the indictment as having been examined before the grand jury), which was accordingly done, and she gave her evidence in favour of the prisoner; the judge ordered her deposition before the coroner to be read, in order to shew its inconsistency with her present testimony. And the twelve judges afterwards were of opinion, that

(*w*) *R. v. Little*, 15 Cox, C. C. 319.

(*x*) As to the practice before this Act see *Ewer v. Ambrose*, 3 B. & C. 750. Bull. N. P. 297.<sup>1</sup>

(*y*) A witness is not adverse within the meaning of this section, merely because his testimony is unfavourable to the party calling him. To be 'adverse' so as to entitle the party calling the witness to prove that he has made at another time a statement inconsistent with his present testimony, he must in the opinion of the judge be 'hostile.' *Greenough v. Eccles*, 5 C. B. (N. S.) 786. 28 L. J. C. P. 160. See *Martin v. Travellers' Insurance Company*, 1 F. & F. 505.

(*z*) See *Jackson v. Thomason*, 31 L. J. Q. B. 11. 1 B. & S. 745. *Ryberg v. Ryberg*, 32 L. J. Mat. Ca. 112.

(*a*) As to the rule on this subject before the above Act, see 2 Phill. Ev. 450. *Wright v. Beckett*, 1 M. & Rob. 414. *Dunn v. Aslett*, 2 M. & Rob. 122. *Holdsworth v.*

*Mayor of Dartmouth*, 2 M. & Rob. 153.

*Winter v. Bull*, 2 M. & Rob. 357. *Allay v. Hutchings*, 2 M. & Rob. 358. *Melhuish v. Collier*, 15 Q. B. 878. *Greenough v. Eccles*, *supra*. *R. v. Farr*, 8 C. & P. 768.

(*b*) There is a similar provision to this in the C. L. P. Act, 1854; see sec. 22.

(*c*) 3 B. & C. 749, 750, 751. *Friedlander v. The London Assurance Company*, 4 B. & Ad. 193. *Richardson v. Allan*, 2 Stark. N. P. C. 334. *Alexander v. Gibson*, 2 Campb. 555. In *Lowe v. Jolliffe*, 1 W. Bl. 365, the subscribing witness to a deed swore to the testator's insanity; yet the plaintiff was allowed to examine other witnesses in support of his case, to prove that the testator was sane. So in *Pike v. Badmering*, cited in 2 Stra. 1096, where the three subscribing witnesses to a will denied their hands, the plaintiff was permitted to contradict that evidence.

(*d*) Bull. N. P. 297.

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<sup>1</sup> See *P. v. Safford*, 5 Denio, 112. *P. v. Ind.* 589. *Henegen v. Parks*, 2 Sandf. Sheehan, 49 Barc. 217. *Quinn v. S.*, 14 60.

the judge had a right to call for the deposition, in order to impeach the witness's credit: and Lord Ellenborough and Mansfield, C. J., thought that the prosecutor had the same right. (*e*)

#### SEC. IV.

##### *How many Witnesses are necessary.*

In general, the testimony of a single witness is a sufficient legal ground for conviction of a crime or misdemeanor, (*f*) even though that single witness may have been the accomplice in guilt of the accused person. (*g*) But there are two exceptions to this rule, viz., the cases of treason and perjury.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as in such case there would be only one oath against another. (*h*)

In high treason, no one can be convicted, unless by the oaths and testimony of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted shall willingly, without violence, in open Court confess the same. (*i*) The confession contemplated is a confession in open Court, or pleading guilty; any other confession, whether made to persons in authority or not, is evidence in the case, and must be proved, like other facts, by two witnesses, and it will have its weight with the jury according to the circumstances, as confessions have in all criminal cases. (*j*) However, by 39 & 40 Geo. 3, c. 93, 'In all cases of high treason, when the overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder.'

#### SEC. V.

##### *How the Attendance of Witnesses to be compelled and remunerated.*

There are two methods in which the attendance of witnesses in criminal cases may be compelled: 1st—which is the more ordinary and effectual means—the justice or coroner that takes the

(*e*) Oldroyd's case, R. & R. 88. See the cases on this subject, *ante*, p. 525.

(*f*) 4 Blac. Com. 357. 2 Hawk. c. 46, s. 3.

(*g*) *Post*, p. 642.

(*h*) Vol. i. p. 368.

(*i*) By the 1 Edw. 6, c. 12, s. 22. 6 Edw. 6, c. 11, s. 12. 7 & 8 Will. 3, c. 3. In high treason concerning the coin, or the King's seals, or sign manual, one witness was sufficient, as at common law before the

reign of Edward VI.; by the 1 & 2 Ph. & M. c. 10, s. 12, and 1 & 2 Ph. & M. c. 11, s. 3 (now repealed). It was agreed by all the judges, that these statutes extended to all offences touching the impairing of coin, which should afterwards be made treason. Gahagan's case, 1 Leach, 42. 1 East, P. C. 129. S. C.

(*j*) 1 East, P. C. 131. Foster's Crown Law, 240, &c.

examination of the person accused, and the information of the witnesses, may at that time, or at any time after and before the trial, bind over the witnesses to appear. (*k*). 2ndly, by process of subpœna.

1st. If a witness does not appear, according to the terms of the recognisance in which he is bound, at the Court at which the trial is intended to be, to give evidence against the party accused, the recognisance may be estreated, and the penalty levied. Justices have authority by the 11 & 12 Vict. c. 42, s. 20, to bind all persons (*l*) by recognisance to give evidence in all cases of treason, felony, and misdemeanor, and coroners have the like authority, by the 7 Geo. 4, c. 64, s. 4, in cases of murder and manslaughter. By the 11 & 12 Vict. c. 42, s. 20, if a witness who has been examined before a justice of the peace refuses to be bound over, the justice may commit him until the trial of the accused, unless in the meantime he duly enters into a recognisance to prosecute or give evidence; and as this is merely an enactment of the previously existing law, it should seem that a coroner has the same power where a witness refuses to enter into a recognisance before him. (*m*) And where before the 11 & 12 Vict. c. 42, the witness was a married woman, and therefore under a legal disability to enter into a recognisance, the justice was held justified in committing her, upon her refusal to appear to give evidence or to find sureties for her appearance. (*n*)

2nd. The attendance of witnesses, if they have not entered into recognisances, may be compelled by process of subpœna, which may either be issued from the Crown Office, (*o*) or may be made out by the clerk of the peace of the sessions, or the clerk of assize. (*p*) And by the 45 Geo. 3, c. 92, s. 8, the service of a subpœna on a witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear. (*q*)

The prosecutor ought not to include more than four persons in one subpœna. (*r*) And as soon as the writ is obtained, a copy should be made out for each witness, and served on him personally, and at the same time the writ should be shewn him. (*s*) The ser-

(*k*) 2 Hale, P. C. 282. 7 Geo. 4, c. 64, s. 4.

(*l*) As to binding the prisoner's witnesses to give evidence, see 30 & 31 Vict. c. 35, *ante*, 551.

(*m*) 2 Hale, P. C. 282. *Bennet v. Watson*, 3 M. & S. 1. In *Evans v. Rees*, 12 A. & E. 55, it was held that a warrant to bring a witness before a justice to find sufficient bail to appear and give evidence at the next assizes was bad; as it did not appear that the witness had been examined before the justice, or refused to enter into a recognisance; but Lord Denman said, 'I throw no doubt on the power of the magistrate to do all that is necessary to compel the attendance of those witnesses whom he knows to be material.'

(*n*) *Bennet v. Watson*, *supra*.

(*o*) *R. v. Ring*, 8 T. R. 585.

(*p*) 1 Chit. C. L. 608. It is more prudent to sue it out of the Crown Office, if an application for an attachment for non-attendance is likely to become necessary. See *post*, p. 640.

(*q*) 'Parts' in this Act mean England, Scotland, and Ireland; and not counties, &c. *R. v. Brownell*, 1 A. & E. 598.

(*r*) *Doe v. Andrews*, Cowp. 845. *Tidd*. 855.

(*s*) In order to save expense, it is settled that service of a ticket, containing the substance of a writ, will be as effectual as service of the writ itself. 2 Phill. Ev. 373.

vice must be personal, and made a reasonable time before the day of trial; for witnesses ought to have a convenient time to put their own affairs in such order that their attendance on the court may be of as little prejudice to themselves as possible. (t)

A subpoena requiring the witness to attend on the commission days of the assizes to give evidence on a trial extends to the whole assizes, which are but one day in contemplation of law. (u)

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the subpoena, called a *duces tecum*, commanding the witness to bring them with him. (v) The writ of *subpoena duces tecum* is the regular and established process of the Court, and though it was formerly doubted, yet it is now settled, that this process is of compulsory obligation on the witness to produce the deeds or writings required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge. (w) And a person in possession of any paper, who is served with a *subpoena duces tecum*, is bound to produce it, whether the paper belong to him or not, or though there be a regular way prescribed by law for obtaining it; (x) and if he refuse to do so, the Court of Queen's Bench will grant an attachment against him. (y) The Court, however, in all such cases, will exercise their discretion in deciding what papers shall be produced, and under what qualifications as respects the interest of the witness. (z) But the Court will not allow counsel for the witness to argue against his liability to produce the documents. (a) A person bringing papers under a *subpoena duces tecum* may be compelled to produce them without being sworn. (b)

If a witness who is sworn to give evidence has a document in his possession in Court, he may be compelled to produce it; for he is just as much under the control of the Court as if he had brought the document under a *subpoena duces tecum*. (c)

In a criminal case, if a person is in Court, he may be compelled to be examined as a witness, although he has neither been bound

(t) 2 Phill. Ev. 373.

(u) Scholes v. Hilton, 10 M. & W. 15.

(v) 2 Phill. Ev. 371.

(w) Amey v. Long, 9 East, 473. 2 Phill. Ev. 371. As to when a bank is not compellable to produce its books unless a judge of one of the superior courts so orders; see 42 Vict. c. 11, s. 6, *ante*, p. 475.

(z) Tidd. 856. Corson v. Dubois, Holt, N. P. C. 239.

(y) R. v. Greenaway, 7 Q. B. 126.

(x) Tidd. 856. 2 Phill. Ev. 371. It will be observed that there is a distinction between the obligation of a witness to answer, though it may subject him to a civil responsibility, and the obligation to produce writings under a subpoena. See *ante*, p. 600. If a *subpoena duces tecum* be served, the party must bring his deeds in obedience to the subpoena; but if he states

them to be his title deeds, no judge will ever compel him to produce them. *Pickering v. Noyes*, 1 B. & C. 263, *R. v. Hunter*, 3 C. & P. 591, and *MSS. C. S. G.* As to whether an attorney can be compelled to produce deeds upon which he has a lien. See *Hope v. Liddell*, 24 L. J. Ch. 691. *Kemp v. King*, 2 M. & Rob. 437. *Doe v. Ross*, 7 M. & W. 102.

(a) *Doe dem. Rowcliffe v. Earl of Egremont*, 2 M. & Rob. 386. *Rolfe, B.*

(b) *Davis v. Dale, M. & Malk.* 514. *Tindal, C. J.* *R. v. Murlis*, *ibid.* note. *Gaselee and Taunton, JJ.* *Perry v. Gibson*, 1 A. & E. 48.

(c) *Snelgrove v. Stevens, C. & M.* 508. *Cresswell, J.* *Doe dem. Loscombe v. Clifford*, 2 C. & K. 448. *Alderson, B. R. v. North*, 1 Cox, C. C. 258. *Dwyer v. Collins*, 7 Exch. 639.

by recognisance nor served with a subpoena to give evidence, and an indictment for the obstruction of a public footway is considered as a criminal prosecution for this purpose. (d)

The Court will not grant a Bench warrant to compel the attendance of a witness, who is keeping out of the way in collusion with the defendants. (e)

By the 16 & 17 Vict. c. 30, s. 9, 'it shall be lawful for one of Her Majesty's principal secretaries of state, or any judge of the Court of Queen's Bench or Common Pleas, or any baron of the Exchequer, in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any Court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such Court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such Court, judge, justice, or other judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of Her Majesty's superior Courts of law at Westminster to be brought before such Court to be examined as a witness in any cause or matter depending before such Court is now by law required to be dealt with.' (f)

When a witness is in custody under civil process, or on board a ship under the command of an officer who refuses to permit his attendance, the subpoena is ineffectual, but a *habeas corpus ad testificandum* may be obtained to bring him up; for which an application may be made to any one of the judges or barons of the Courts of King's Bench, Common Pleas, and Exchequer, in England or Ireland, who have discretionary power to grant it to any part of the United Kingdom, to bring a witness before any Court of record, to be examined before such Court, or any grand, petit, or other jury, in any cause or matter, civil or criminal. (g) The application for this writ must be made upon an affidavit sworn to by the party applying, stating that the party is a material witness and willing to attend; (h) and if he be at a distance, it should be shewn how he is material. (i) The writ being sued out should be left with the sheriff,

(d) *R. v. Sadler*, 4 C. & P. 218. Little-dale, J.

(e) *R. v. Crawford*, 6 Cox, C. C. 481.

(f) By 30 & 31 Vict. c. 35, s. 10, where recognisances shall have been entered into for the appearance of any person to take his trial for any offence at any Court of criminal jurisdiction, and a bill of indictment shall be found against him, and such person shall be then in the prison belonging to the jurisdiction of such Court, under warrant of commitment, or under sentence for some other offence, it shall be lawful for the Court, by order in writing, to direct

the governor of the said prison to bring up the body of such person in order that he may be arraigned upon such indictment, without writ of *habeas corpus*, and the said governor shall thereupon obey such order.

(g) 43 Geo. 3, c. 140. 44 Geo. 3, c. 102. 2 Phill. Ev. 374, 375.

(h) *R. v. Roddam*, Cowp. 672.

(i) Tidd. 858. It is said in 1 Chitt. C. L. 610, that the affidavit of readiness to attend only applies when the party is on board ship, and not then in all cases.

or other officer, in whose custody the witness is detained, who will bring him up, upon being paid his reasonable charges. (*j*) If a witness be a prisoner of war, a *habeas corpus* will not lie to bring him up, but an order from the Secretary of State must be obtained. (*k*)

Upon an affidavit that a person confined as a lunatic is not dangerous, but in a fit state to be brought up, a *habeas corpus* may be granted in order that he may be examined as a witness. (*l*) And where a witness is under duress of some third person, as a sailor on board a man-of-war, his attendance may be obtained by the same means. (*m*)

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses without the special order of the Court; (*n*) although in misdemeanors the defendant has always been allowed to take out subpoenas. (*o*) But the 7 Will. 3, c. 3, s. 7, provided, that in cases of high treason, where corruption of blood might be worked, the persons indicted shall have the like process of the Court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them; and since the 1 Anne, st. 2, c. 9, s. 3, by which it is provided that witnesses for the prisoner, in case of treason or felony, shall be sworn in the same manner as witnesses for the Crown, and be subject to the same punishment for perjury, the process by subpoena is allowed to defendants in cases of felony as well as in other instances. (*p*)

If a party, having been served with a subpoena, neglect to appear in obedience to it, an application may be made to the Court of Queen's Bench, if the subpoena issued from the Crown Office, for an attachment against him; (*q*) and where the process is served in one part of the United Kingdom for the appearance of the witness in another of the parts, the Court issuing the same may, upon proof to their satisfaction of the due service of the subpoena, transmit a certiorari of the default of the witness, under the seal of the Court, or under the hand of one of the justices thereof, to the Court of King's Bench if the service were in England, to the Court of Justiciary if in Scotland, and to the Court of King's Bench in Ireland, if in Ireland; which Courts are empowered to punish the witness in the same way as if he had disobeyed a subpoena issued out of those Courts, providing the expenses have been tendered. (*r*) It has been doubted whether in all cases, as well as in those within the last-mentioned statute, a witness may not lawfully refuse to obey a subpoena in a criminal prosecution, as well as a civil suit, unless

(*j*) 2 Phill. Ev. 375.

(*k*) Furlly v. Newnham, 2 Dougl. 419.

(*l*) Fennell v. Tait, 5 Tyrw. R. 218.

(*m*) R. v. Roddam, Cowp. 672. 1 Stark. Evid. 105.

(*n*) 4 Blac. Com. 359. 2 Hawk. c. 46, s. 170. If they had attended they could not have been sworn before the 1 Ann. st. 2, c. 9, s. 3.

(*o*) 2 Hawk. P. C. c. 46, s. 170.

(*p*) 2 Hawk. P. C. c. 46, s. 172. See *ante*, p. 551, as to magistrates binding over the prisoner's witnesses to give evidence.

(*q*) R. v. Ring, 8 T. R. 585. And a witness who refuses, after being subpoenaed, to attend to give evidence for a defendant, is liable to an attachment, as in the case of being subpoenaed by a prosecutor. 1 Stark. Ev. 86.

(*r*) 43 Geo. 3, c. 92, ss. 3, 4. 1 Chit. Cr. L. 614. It is said to be doubtful whether the justices at sessions, &c., have authority to issue an attachment, and that the only mode of proceeding against a witness in such a case is by indictment. Archb. Cr. L. 248.

he has a tender of his reasonable expenses; but the better opinion seems to be, that witnesses making default on criminal prosecutions are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpoena; although the Court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. (s)

As to payment of witnesses' expenses and compensating them for loss of time, see Vol. I. p. 90.

A person subpoenaed as a witness, or bound over by recognisance, either to prosecute or give evidence, or attending voluntarily for the *bonâ fide* purpose of giving evidence, is privileged from arrest during the necessary time occupied in going to the place where his attendance is required, in staying there for the purpose of such attendance, and in returning from that place. (t) And in allowing witnesses time sufficient for these purposes, the Courts are always disposed to be liberal. (u) If a witness under these circumstances be arrested, the court out of which the subpoena issued, or the judge of the court in which the cause has been, or is to be tried, will, upon application, order him to be discharged. (v)

When any offence has arisen in India, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by the 13 Geo. 3, c. 63, ss. 40, 44. (w) And in case of a prosecution for any offence committed abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by the 42 Geo. 3, c. 85.

(s) 2 Phill. Ev. 383; but see 1 Chit. Cr. L. 613. At York Summer Assizes, 1820, Bayley, J., ruled that an unwilling witness, who required to be *paid* before he gave evidence, could not demand it. He said, 'I fear I have not the power to order you your expenses.' And on asking the bar if any one recollected an instance, Scarlett answered, 'It is not done in criminal cases.' MS. 1 Chetw. Burn. 1001. In *R. v. Cousens*, Gloucester Spr. Ass. 1843, Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpoena duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid. In *R. v. Cooke*, 1 C. & P. 321, an indictment for a conspiracy removed into the King's Bench by *certiorari*, a witness called by the defendant stated before he was examined, that at the time he was served with a subpoena, no money was paid him; he therefore

asked that the judge would order the defendant to pay him his expenses before he was examined. J. A. Park, J., having consulted with Garrow, B., said they were of opinion that the judge had no power in a criminal case to order a defendant to pay a witness his expenses, although subpoenaed, and though the indictment came to be tried as a civil record. See also *Pell v. Daubeny*, 5 Exch. R. 955.

(t) *Meekins v. Smith*, 1 H. Bl. 636. *Lightfoot v. Cameron*, 2 Bl. 1113. *Childerston v. Barrett*, 11 East, 439. *Arding v. Flower*, 8 T. R. 536. But this privilege does not extend to arrests by his bail, for the purpose of being surrendered; for he is supposed to be in their custody even while attending as a witness. *Ex parte Lyne*, 3 Stark. N. P. C. 132.

(u) 1 Phill. Ev. 4.

(v) Archb. Cr. Pl. 248.

(w) See *ante*, p. 573, as to interrogatories by consent.

## SEC. VI.

Of Accomplices. (x)<sup>1</sup>

The practice of admitting the testimony of accomplices and the promise of pardon, express or implied, under which they usually give their evidence, were introduced instead of the ancient system of approvement, which Lord Hale, in his pleas of the Crown, speaks of as having been already long disused. (y) Approvement was when a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices of the same crime, in order to obtain his pardon. (z) He was also bound to discover on oath, not only the particular crime charged upon him, but all treasons and felonies of which he could give any information. (a) It was purely in the discretion of the Court to permit the approvement or not; if they allowed it, the party accused was put on his trial: whereon, if he was convicted, the approver had his pardon *ex debito justitiæ*: (b) if he was acquitted, the approver received judgment of death upon his own confession of the indictment. (c)

All the good that could be expected from this method of approvement is now more fully provided for and secured by one of the following methods: 1st, By special proclamation in the Gazette or otherwise, pardon is sometimes promised upon certain conditions. Accomplices within this class have a *right* to pardon. (d) 2ndly, By the practice most usually adopted accomplices are admitted to give evidence for the Crown, under an implied promise of pardon, on condition of their making a full and fair confession of the truth. (e) On a strict and ample performance of this condition, to the satisfaction of the judge presiding at the trial (although they are

(x) Before the Act, by which a person convicted of a crime is not incompetent as a witness on that account, an accomplice was a competent witness before conviction and judgment. *R. v. Castell Careinion*, 8 East, R. 77. 2 Hawk. P. C. c. 46, ss. 94, 95. *Tong's case*, Kel. 17, 18. 1 Hale, P. C. 303, 304. 1 Phill. Ev. 28. *R. v. Westbeer*, 1 Leach, 12. *R. v. Russell*, R. & M. 356. And this was so, though he was indicted, if not put on his trial at the same time with the prisoner against whom he gave evidence. *Bilmore's case*, 1 Hale, 305. *R. v. Clark*, *ibid.* note. 2 Stark. Ev. 12. And see *R. v. Lyons*, 9 C. & P. 555, *post*, p. 661. *Sir Percy Cresby's case*, 1 Hale, P. C. 303. 1 Phill. Ev. 28. No promise of pardon or reward rendered a witness incompetent. 2 Hale, P. C. 280. *Tong's case*, Kel. 17. *Layer's*

*case*, 6 St. Tr. 259. 2 Hawk. P. C. c. 46, s. 135. 1 Hale, P. C. 304. 1 Phill. Ev. 27.

(y) 2 Hale, 226.

(z) 4 Blac. Com. 330.

(a) 2 Hale, P. C. 227.

(b) 4 Blac. Com. 330.

(c) *Ibid.*

(d) *R. v. Rudd*, Cowp. 334, by Lord Mansfield, in giving judgment. S. P. S. C. 1 Leach, 118, 4th ed. But the promise of a pardon by proclamation in the Gazette does not give the party a legal right to exemption from punishment. *R. v. Gar-side*, 2 Ad. & E. 266. He should apply to the judge to postpone the execution, in order that an application may be made to the Secretary of State for a pardon.

(e) *R. v. Rudd*, *supra*.

## AMERICAN NOTE.

<sup>1</sup> See *Brown v. C.*, 2 Leigh, 769. P. v. Dyle, 21 N. Y. 578. *S. v. Howard*, 32 Verm. 380. *Myers v. P.*, 26 Ill. 173. P. v. Garnell, 29 Cal. 622. *Sumpter v. S.*, 11 Fla. 247. *S. v. Thornton*, 26 Iowa, 79. *Foster v. P.*, 18 Mich. 266. *Parsons v. S.*, 43 Geo. 197. *Lopez v. S.*, 34 Texas, 133. *S. v. Litchfield*, 58 Maine, 267.



not of right entitled to pardon), they have an equitable title to a recommendation for the Queen's mercy. (*f*) They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial, in order to give the prisoner time for an application in another quarter. (*g*) And if an accomplice, after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, he will be sent to trial to answer for his share of guilt in the transaction. (*h*) It is not a matter of course to admit an offender as witness on the trial of his associates, not even after he has been so allowed by the committing magistrate. The practice is (where the accomplice is in custody) for the counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential. (*i*) And it is in the

(*f*) *Ibid.* The equitable claim to pardon does not protect an accomplice from prosecutions for other offences, in which he was not concerned with the prisoner, but it is entirely in the discretion of the judge whether he will recommend the prisoner to mercy. *R. v. Lee, R. & R.* 361. *R. v. Brunton, ibid.* 454. *S. C. MS. Burn's Just.* by Chetwynd, tit. *Approver*. With respect to such offences, therefore, he is not bound to answer on his cross-examination. *West's case, MS. 1 Phill. Ev. 28.* Where an accomplice made a disclosure of property, which was the subject-matter of a different robbery by the same parties, under the impression that by the information he had previously given as to the robbery of other property he had delivered himself from the consequences of having the property he so disclosed in his possession; *Coleridge, J.*, recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property. *Garside's case, 2 Lew. 38.* In England principals have frequently been allowed to become witnesses against accessories. See *Wild's case, 1 Leach, 17*, note (*a*). And cases frequently occur where the accessory is far the more guilty party; as where young persons have been induced to commit crimes by the procurement of old offenders: and in such cases the young persons are not unfrequently admitted as witnesses for the Crown.<sup>1</sup>

(*g*) *1 Phill. Ev. 28.*

(*h*) *Ibid.* *Moore's case, 2 Lew. 37.* In one instance a prisoner, who had made a confession after a representation made to him by a constable in gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been

admitted as a witness against his associates, on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. *R. v. Burley, cor. Garrow, B., Leicester Lent Assizes, 1818.* And the conviction was afterwards approved of by all the judges. *MS. 2 Stark. Ev. 13.* So where an accomplice when sworn pretended that he knew nothing of the stealing of a sheep, *Coleridge, J.*, committed him for trial at the next assizes, when he was convicted and transported, upon proof of his statement made to a policeman before he was called as a witness. *R. v. Smith, Gloucester Spr. and Sum. Ass. 1841.* So where an accomplice, who was called as a witness against several prisoners, gave evidence which shewed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty; *Parke, B.*, thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried for the robbery. *R. v. Stokes and others, Stafford Spr. Ass. 1837.* And where an accomplice, who had made a full disclosure of the facts attending the commission of a burglary when before the committing magistrate, refused before the grand jury to give any evidence at all; *Wightman, J.*, ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *R. v. Holtham and five others, Stafford Spr. Ass. 1843.*<sup>2</sup>

(*i*) *2 Stark. Ev. 2.* If, however, the

#### AMERICAN NOTES.

<sup>1</sup> It has been held in America that if an accomplice appears to have been the principal offender, he will be rejected. *P. v. Whipple, 9 Cowen, 707, Greenl. Ev. 426.*

<sup>2</sup> It has been held in America, that if an accomplice, having made a private con-

fession, upon a promise of pardon made by the attorney-general, should afterwards refuse to testify, he may be convicted upon the evidence of that confession. *C. v. Knapp, 10 Pick. 477, as cited Greenl. Ev. 426.*

discretion of the Court, under all the circumstances of the case, whether the application be granted or refused. (*j*) And where one prisoner pleaded guilty, and an application was made to admit him as a witness against the other; Hill, J., directed the witnesses, who were relied upon to corroborate him, to be called first, and, if their evidence was sufficiently strong, then the accomplice might be examined as a witness. (*k*)

This application is usually made before the bill is taken before the grand jury, and if the application is granted, the accomplice is not included in the indictment. (*l*) Upon an indictment for conspiracy the Court allowed an acquittal to be taken against some of the defendants in order that they might be called as witnesses for the prosecution. (*m*) And the same course may be adopted, with the permission of the Court, in a case of felony. (*n*) Upon an indictment for rape, as soon as the jury were sworn, it was proposed, on the part of the prosecution, that one of the prisoners should be acquitted before the case was gone into, as he was intended to be called as a witness against the other prisoners, and upon this being objected to, on behalf of the other prisoners; Williams, J., (having conferred with Alderson, B.,) said, 'I had little doubt as to the course I ought to take, and my learned Brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind the Court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the counsel who conduct the prosecution. I shall, therefore, in this case, entrust it to the discretion of the counsel whether he will have the prisoner acquitted before the case is gone into or not. I think it almost of course.' (*o*)

On an indictment for murder against two prisoners, one of them,

accomplice be taken before the grand jury, by means of a surreptitious and illegal order, the indictment so found is good. Doctor Dodd's case, 1 Leach, 155. It is not usual to admit more than one accomplice. Barnsley Rioters' case, 1 Lewin, 5, Parke, J. But under peculiar circumstances three have been admitted. Scott's case, 2 Lew. 36, Lord Denman, C. J. In this case the accomplices spoke to different facts, and no one could prove the whole. See *R. v. Noakes*, 5 C. & P. 326.

(*j*) 1 Phill. Ev. 29. The Court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the Court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the Court will refuse to admit him as a witness. Thus where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of the accomplice was required; Gurney, B., refused to permit one of the principals to become a witness. *R. v. Mellor* and others, Stafford

Sum. Ass. 1833. So in *R. v. Saunders* and others, Worcester Spr. Assizes, 1842, on a motion to admit an accomplice, Patteson, J., said, 'I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do.' And in *R. v. Salt* and others, Stafford Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness.

(*k*) *R. v. Sparks*, 1 F. & F. 388.

(*l*) 1 Phill. Ev. 29.

(*m*) *R. v. Rowland*, R. & M. N. P. R. 401. So formerly if an accomplice jointly indicted with others pleaded guilty, and was fined by the Court, and paid the fine (in a case where such fine might be imposed by way of punishment, and where the suffering the punishment restored the competency), he might be called as a witness by the other prisoners. *R. v. Fletcher*, 1 Str. 638. See also *R. v. Sherman*, C. T. H. 303.

(*n*) 1 Phill. Ev. 29.

(*o*) *R. v. Owen*, 9 C. & P. 83. At the conclusion of the opening, the prisoner was asked whether he would give evidence, and refused, and the case proceeded against all the prisoners. See 2 Hawk. P. C. c. 46, s. 95.

without being convicted or acquitted, was called as a witness against the other, who alone was put on her trial, it was held that this might be done; but per Cockburn, C. J.: 'I felt the force of what was said about the fellow prisoner coming forward to give evidence without having been first acquitted, or convicted and sentence passed. I think that was much to be lamented. In all such cases, where two persons are joined in the same indictment, and it is thought desirable to separate them in their trials in order that the evidence of the one may be taken against the other, in order to insure the greatest possible amount of truthfulness on the part of the person who is giving evidence under such remarkable circumstances, I think it would be far better that a verdict of not guilty should be taken first, or if the plea of not guilty be withdrawn, and a plea of guilty received, that sentence should be passed, in order that the mind of the witness may be free from all corrupt influences which the fear of impending punishment and the desire to obtain immunity at the expense of the prisoner might be otherwise liable to produce.' (p)

But where R., B., and F. were jointly indicted for blasphemous libel, and B. applied for and obtained a separate trial, it was held that he could call R. and F. as witnesses on his behalf although they ought not to be called as witnesses for the prosecution without taking a verdict of acquittal against them. (q)

It being established that an accomplice is a competent witness, the consequence is inevitable, that if credit be given to his evidence, it requires no confirmation from another witness. (r) And therefore, in strictness, if the jury believe the evidence of an accomplice, they may legally convict a prisoner upon it, though it stands totally uncorroborated. (s) But from a consideration of the situation of an accomplice, this doctrine has been greatly modified in practice; and it has long been considered as a general rule of practice that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner. (t) It has been laid down that this practice of requiring some confirmation of an accomplice's evidence must be considered in strictness as resting only upon the discretion of the judge. (u) And this, indeed, appears to be the only mode in which it can be made reconcileable with the doctrine already stated, that a legal conviction

(p) *Winsor v. R.*, L. R. 1 Q. B. 289. 35 L. J. M. C. 121.

(q) Per Lord Coleridge, C. J., *R. v. Bradlaugh*, 15 Cox, C. C. 217.

(r) By Lord Ellenborough in *R. v. Jones*, 2 Campb. 133. *R. v. Hastings*, 7 C. & P. 152, Lord Denman, C. J., Parke, J., and Alderson, B.

(s) *R. v. Atwood*, 1 Leach, 464, also cited by Grose, J., in *Jordaine v. Lashbrooke*, 7 T. R. 609. *R. v. Durham*, 1 Leach, 478.

*R. v. Andrews*, 1 Cox, C. C. 183. *R. v. Avery*, 1 Cox, C. C. 206. *R. v. Stubbs*, Dears. C. C. 555.

(t) 1 Phill. Ev. 31. *Smith and Davis's case*, 1 Leach, 479, in note (a) to *Durham's case*. See per Lord Abinger, C. B., in *R. v. Farler*, *post*, p. 647, and *R. v. Dunne*, 5 Cox. C. C. 507.<sup>1</sup>

(u) 1 Phill. Ev. 32. By Lord Ellenborough, *R. v. Jones*, 2 Campb. 132. *R. v. Durham*, *supra*.

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<sup>1</sup> See *C. v. Bosworth*, 22 Pick. 397, and *contra. P. v. Costello*, 1 Denio, 83. *Keith-*

*ler v. S.*, 10 S. M. 192. *S. v. Brown*, 3 Strobb. 508.

may take place upon the unsupported evidence of an accomplice. But it may be observed that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' (v) and a deviation from it in any particular case would be justly considered of questionable propriety. (w) This confirmation need not extend to every part of the accomplice's evidence, for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts as to which there is no confirmation. (x) So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist, relates to the particular part or parts of the accomplice's testimony which ought to be confirmed. (y)

It is well established by the current of recent authorities, that it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged. And where several prisoners are jointly indicted, and the accomplice is corroborated as to some of them, although the jury may give credit to him as to those to whom the corroboration applies, they ought to be directed to pay no attention to the evidence of the accomplice as to those against whom there is no corroboration. (z)

Upon an indictment for breaking into a warehouse and stealing a quantity of cheese, an accomplice proved that the thieves took a ladder from certain premises, and it was proved by a witness that the ladder was so taken away, and it was proposed to call other witnesses to confirm the accomplice as to the mode in which the felony was committed. Williams, J., 'You must shew something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice, is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon, for, at least, knowing how the felony was committed. It has been always my opinion that confirmation of this kind is of no use whatever.' (a) So where the prisoner was indicted for stealing a lamb, and an accomplice proved that he assisted the prisoner in stealing the lamb, but the only evidence to confirm his statement was that of a witness, who found the skin of the lamb in the field where the lamb had been kept; it was held that the confirmation was insufficient; and upon its being submitted that there was evidence to go to the jury, and *R. v. Hastings* (b) being cited as shewing that the

(v) Per Lord Abinger, C. B., in *R. v. Farler*, *post*, p. 647.

(w) 1 Phill. Ev. 32. Greenl. Ev. 426.

(x) 1 Phill. Ev. 34. 2 Stark. Ev. 14.

(y) 1 Phill. Ev. 34.

(z) See cases to the contrary, *R. v. Dawber*, 3 Stark. N. P. C. 34. 2 Campb. 133.

So in *Birkett's case*, R. & R. 251. *R. v. Swallow*, report of the trials at York in 1814, cited 1 Phill. Ev. 35. 1 Phill. Ev. 37, 8th ed. *R. v. Hastings*, 7 C. & P. 152.

(a) *R. v. Webb*, 6 C. & P. 595. The prisoners were acquitted.

(b) *Supra*.

confirmation of the accomplice need not be as to the party accused; Gurney, B., said, 'Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice, unconfirmed with respect to the party accused.' (c).

The corroboration must not only connect the prisoner and the accomplice together, but must be such as to shew that the prisoner was engaged in the transaction which forms the subject-matter of the charge under investigation. (d)

In *R. v. Wilkes*, 7 C. & P. 272, Alderson, B., said in summing up, 'The confirmation of the accomplice as to the commission of the felony is really no confirmation at all, because it would be a confirmation as much if the accusation were against you and me as it would be as to those prisoners who are now upon their trial. The confirmation, which I always advise juries to require, is a confirmation of some fact which goes to fix the guilt upon the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely upon his testimony; but I advise juries never to act on the evidence of an accomplice unless he is confirmed as to the particular prisoner who is charged with the offence.'

Upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, one a large, the other a small one, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid; on the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen; and the skins were found in the place named by the accomplice. Patteson, J., 'If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient. For example, the finding the skins at the place at which the accomplice said they were would have been no confirmation of the evidence against the prisoner, because the accomplice might have put the skins there himself. But here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury.' (e)

(c) *R. v. Dyke*, 8 C. & P. 261.

(d) *R. v. Farler*, MSS. C. S. G. 8 C. & P. 106, *et per* Abinger, C. B., 'Now, in my opinion, corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he

had stated all the facts correctly; that he had described how the person did put the knife to the throat, and did steal the property; it would not at all tend to shew that the party accused participated in it.' See *R. v. Addis*, 6 C. & P. 388. *Kelsey's case*, 2 Lew. 45, Patteson, J.

(e) *R. v. Birkett*, 8 C. & P. 732. The prisoner was acquitted. Assuming that the confirmation in this case shewed the prisoner to have been connected with the transaction, the fact of his being the receiver and not the principal seems to have been wholly uncorroborated. C. S. G.

Where the principal witness against two prisoners was an accomplice who was supported by other evidence in his statement against one of the prisoners, but not against the other; Alderson, B., told the jury that 'where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me that it would be unjust to give it a general effect.' (f)

Where Stubbs, Wardle, and Wraithman were indicted for larceny of copper, and three accomplices were examined, but their evidence was not corroborated as to Stubbs, but only as to the other prisoners, it was urged on behalf of Stubbs that the jury ought to be directed that the evidence of the accomplices ought to have been corroborated as to Stubbs; but the chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner; that their being corroborated as to material facts tending to shew that the other prisoners were connected with the larceny was sufficient as to the whole case, but that the jury should look with more suspicion at the evidence in Stubbs' case, where there was no corroboration, but that it was a question for the jury; and upon a case reserved upon the question whether this direction was right, Jervis, C. J., said, 'We cannot interfere in this case, although we may regret the result that has been arrived at. It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation. There is a further point in this case. Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner; but it is proper for the judge in such case to advise the jury that it is safer to require confirmation as to the third prisoner, and not to act on the accomplice's evidence alone; for nothing is so easy as for the accomplice, speaking truly as to all the other facts of the case, to put the third man in his own place; but a jury may, if they choose, act on the unconfirmed testimony of an accomplice: in this case they have acted on the evidence before them, and we cannot interfere.' Parke, B., 'During the time I have been on the bench, now more than a quarter of a century, I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice, but that great caution should be exercised, and I have advised them, and juries have acted on that advice, not to find a prisoner guilty on such testimony unless it was confirmed. There has been a difference of opinion as to what corroboration is

(f) *R. v. Jenkins*, 1 Cox, C. C. 177. *R. v. Wilkes*, 7 C. & P. 272.

requisite, but my practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. An accomplice necessarily knows all the facts of the case, and his story, when the question of identity is raised, does not receive any support from its consistency with these facts. The chairman in this case has departed from the usual practice, but the jury having acted upon the evidence, the secretary of state can only interfere.' Cresswell, J., 'I agree in the view of the question taken by my Brother Parke, and have always acted upon it. You may take it for granted that the accomplice was present when the offence was committed, and there may therefore be no difficulty in corroborating him as to the facts, but that has no tendency to shew that any particular person who may be accused was there.' (g)

Where on an information for bribery which contained eight counts, each charging a distinct act of bribing different voters, it appeared that the witnesses went successively into a house, and into a back room, in which the defendant was seated, and after an interview with the defendant each of them passed into another room in which another person was seated, from whom each received the several sums mentioned in the several counts of the information, and then passed into the street and to the hustings and voted; it was objected that there was no corroborative evidence of each of the witnesses, and that the jury ought to be directed not to act upon the evidence of each of the witnesses, but to acquit the defendant. Martin, B., however, left the case to the jury as follows: 'Assume, for the purposes of the present discussion, that this man was speaking the truth. Is there any *law* which prohibits a jury from believing a man who (it must be assumed for the sake of argument) spoke the truth, simply because he is not corroborated? I know of none. I know of *no rule of law* myself, but there is a *rule of practice* which has become so hallowed as to be deserving of respect; I believe these are the very words of Lord Abinger—it deserves to have all the reverence of the law. (h) This case is distinguishable from *R. v. Stubbs*, for they were there accessories properly so called, and all the persons were concerned in the same offence in which they came to give evidence; in this particular case it is not so, because all of these cases are separately gone into, and it is not one and the same offence; and if you think that all these witnesses have spoken the truth, then it is clear that each case is separate; each person giving money is a distinct offence. I own I think also that this is a very important point, and that it may be very doubtful whether or not the evidence in this case will be found to be of that corroborative character which the law requires.' (i) The jury found a verdict of guilty on one count only; and on a motion for a new trial, the Court held that the direction to the jury was right, even supposing the witnesses could be considered as accomplices of the defendant. 'The law on this subject was correctly laid down in *R. v. Stubbs*. It is not a rule of law that

(g) *R. v. Stubbs*, Dears. C. C. 555.

(h) See *R. v. Farler*, *ante*, p. 647.

(i) This summing up is taken from the

report in 5 L. T. 147, where it is much better given than in the report in 1 B. & S.

311.

an accomplice must be corroborated in order to render a conviction valid, but it is a rule of general and usual practice to advise juries not to convict on the evidence of an accomplice *alone*. The application of that rule, however, is matter for the discretion of the judge by whom the case is tried. Moreover, in this case the Court thought there was corroborative evidence. It was not necessary that there should be corroborative evidence as to the very fact; it is enough if there be such as to confirm the jury in the belief that the accomplice is speaking the truth.' (j)

Where it was strongly contended that two accomplices had not been corroborated; Maule, J., said, 'Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. If, for instance, a burglary had been committed, and an accomplice gave evidence that a person charged was present when it was effected; if that person had been seen hovering about the premises some time before, or was seen in possession of some of the stolen property shortly after, that might be reasonable confirmation of the statement that the prisoner helped to commit the crime.' (k)

Upon an indictment for stealing a sheet it appeared that the sheet was found in the house of the accomplice, who gave evidence to prove that the prisoners stole the sheet, and the wife of the accomplice was the only person to confirm the accomplice's statement; J. A. Park, J., 'Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose. The prisoners must be acquitted.' (l)

Where a principal and receiver are jointly indicted, and an accomplice is confirmed as against the principal, but not as against the receiver, this is not sufficient to support the case against the receiver. (m)

One prisoner was indicted for stealing, and two other prisoners for receiving, several pairs of shoes, knowing them to have been stolen, and the only witness to prove the felony was an accomplice, and she also proved the case against the receivers; she was confirmed as to the latter, but there was no confirmation whatever as to her testimony against the principal; it was objected that even as to

(j) *R. v. Boyes*, 1 B. & S. 311. As to the distinction taken between *R. v. Stubbs* and this case, it seems to make no difference. If a man is charged with several offences in the same indictment, the evidence to prove each ought to be the same as if each were the subject of a separate indictment. In this case each act of bribery appears to have been proved by the party bribed alone; there, therefore, was no corroboration at all as to any one act of bribery. Suppose a servant were indicted for three larcenies from his master within six months, and three receivers gave evidence against him, but they were the only witnesses, it seems clear the case ought wholly to fail for want of any corroboration. See *R. v. Pratt*, 4 F. & F. 315. C. S. G.

(k) *R. v. Mullins*, 3 Cox, C. C. 526. Wightman, J., was present.

(l) *R. v. Neal*, 7 C. & P. 168. Mr. Philipps, vol. i. p. 33, observes, that in this case 'the circumstances of the case might have been such as to warrant this decision. But it may often happen that the evidence of the wife is so free from all suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient confirmation.'

(m) *R. v. Moores*, 7 C. & P. 270.



the receivers the confirmation was not sufficient in itself; but if it was, it would still be necessary to confirm the witness as against the principal; for if the case failed against her, the receivers would be entitled to an acquittal. *Littledale, J.*, 'The confirmation as to the receivers is slight; but as there is no confirmation against the principal felon, I think the case fails altogether; there ought to be confirmation on that point before the jury can be asked to believe the witness's testimony.' (n)

So where on an indictment against a prisoner for receiving stolen oats, a quantity of oats were found on the prisoner's premises, which the prosecutor believed to be his, but could not positively identify them, as they were mixed with peas, and the only other evidence was that of the thief, who had pleaded guilty; *Pollock, C. B.*, advised the jury to acquit the prisoner, it being perilous to convict a person as receiver on the sole evidence of the thief. This would put it in the power of a thief, from malice or revenge, to lay a crime on any one against whom he had a grudge. And here there was no adequate confirmation of the thief's evidence. (o)

The practice of requiring confirmation where the case for the prosecution is supported by one accomplice, applies equally when two or more accomplices are brought forward against a prisoner. (p)

A married woman who consents to her husband committing an unnatural offence with her is an accomplice in the felony, and as such her evidence requires confirmation. (q) And the same would be the case if the party with whom the offence was committed was a male, and consented. (r)

Although all persons who are present aiding and assisting at a prize fight are in point of law principals in the second degree in manslaughter if death ensues, yet they have been holden not to be such accomplices as to require any evidence to confirm their testimony. (s)

Where upon an indictment against two prisoners for maliciously shooting, and against a third as an accessory after the fact, a person proved that he had been employed by the accessory to remove the principals out of the way, and for this he had received money, and had hidden the principals in an outhouse, and there was no corroboration by any other witness as to these facts; and it was contended that as the witness was an accomplice he ought to be corroborated; *Gurney, B.*, observed, in summing up, that 'with regard to the necessity of confirming an accomplice much might

(n) *R. v. Wells, M. & M. 326.* All the prisoners were acquitted. It is not stated what the form of the indictment was, but it is conceived it must have alleged the receipt to be of the shoes 'so stolen as aforesaid,' so that an acquittal of the principal necessarily caused an acquittal of the receivers. See *R. v. Woolford, 1 M. & Rob. 384, vol. ii. p. 439.* If there had been counts charging the receivers with a substantive felony, there seems no reason why the receivers might not have been convicted, though the principal was acquitted. See vol. ii. p. 441, and *R. v. Field, post, p. 652. C. S. G.*

(o) *R. v. Robinson, 4 F. & F. 43. R. v. Pratt, 4 F. & F. 315.*

(p) 1 *Phill. Ev. 33. R. v. Stubbs, Dears. C. C. 555, ante, p. 649. R. v. Noakes, 5 C. & P. 326, cor. Littledale, J., Bolland, B., and Alderson, J.*

(q) *R. v. Jellyman, 8 C. & P. 604.*

(r) *Per Patteson, J., ibid.*

(s) *R. v. Hargrave, 5 C. & P. 170, Patteson, J. R. v. Young, 10 Cox, C. C. 371, a case of a sparring match, which Bramwell, B., thought was not illegal.*

depend upon the nature of the crime in question: it was for the jury to consider whether there was anything in the witness's conduct to warrant their disbelieving him.' (t)

It has been holden that the fact of a party having been summarily convicted for poaching in the night under the 9 Geo. 4, c. 69, s. 1, does not dispense with the necessity of producing confirmatory evidence of his testimony when produced as a witness against his companions upon an indictment, under the 9th section of the same statute, founded upon the same transaction. (u)

Where on an indictment against certain Chartists under the 11 & 12 Vict. c. 12, two witnesses admitted that they joined the conspirators simply for the purpose of betraying them, and each did so without the knowledge of the other, but both had been as active as any of the conspirators, endeavouring to persuade strangers to join them, and urging those who were members to deeds of violence: it was held that there was no rule of law which declared that their evidence required confirmation, nor any rule of practice which said that juries ought not to believe them. A spy may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and, if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, there is no impropriety in his taking upon himself the character of informer. The government are justified in employing spies, and a person so employed does not deserve to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices. (v)

The case of *R. v. Farler* (w) is an authority that the practice of requiring confirmation of an accomplice extends to misdemeanors.

Whether the evidence brought forward to confirm the accomplice is a satisfactory and sufficient confirmation is a question which the jury are to determine. (x)

In a case of great importance where an accomplice swearing positively to several prisoners was confirmed as to some and not confirmed as to others; Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed. (y)

An accomplice is a competent witness for his associates as well as

(t) *R. v. Jarvis*, 2 M. & Rob. 40. In *R. v. Durham*, 1 Leach, 478, where a receiver was admitted as a witness against some burglars, and was uncorroborated, the Court observed that the receiver was to be considered rather as an accessory after the fact than as an accomplice in the facts; but this distinction seems never to have been acted upon in any case, and the case in which it was taken was decided on the authority of *R. v. Atwood*, *ante*, p. 645, on the ground that the circumstance of his being an accomplice went to his credit only, and that his evidence might be left to the jury, although it was

entirely uncorroborated. See *R. v. Robinson*, *ante*, p. 651, note (o).

(u) *R. v. Farler*, 8 C. & P. 106, *ante*, p. 647.

(v) *R. v. Mullins*, 3 Cox, C. C. 526. Maule and Wightman, JJ.

(w) *Supra*, note (u). And see *R. v. Boyes*, 1 B. & S. 311. *Ante*, p. 650. But see per Gibbs, Attorney-General, in *R. v. Jones*, 31 How. St. Tr. 315.

(x) 1 Phill. Ev. 38.

(y) *R. v. Field*, Dick. Q. S. 520. See per Alderson, B., in *R. v. Wilkes*, 7 C. & P. 272.

against them, even when they are severally indicted for the same offence, whether he is convicted or not. (z) Where there is not any or very slight evidence against one of several prisoners indicted and tried together, the Court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him admit his testimony for the others. (a) In a case where one of the defendants on an indictment for an assault submitted and was fined, and paid the fine; Pratt, C. J., allowed him to be a witness for the other, considering the trial at an end with respect to him. (b) Where one of two prisoners charged with housebreaking pleaded guilty; Coltman, J., held that this prisoner might be called as a witness by the other prisoner to prove that he was not present at the committing of the offence; (c) and in another case Erle, J., allowed a prisoner who pleaded guilty to an indictment for uttering a forged note, and against whom a previous conviction was proved, to be called as a witness for another prisoner; but he was previously sentenced, which Erle, J., considered to be the proper course. (d)

## SEC. VII.

*What Witnesses are Competent.*<sup>1</sup>

By the competency of a witness is meant his admissibility to give evidence; if he is incompetent (of which the Court is to judge) (e) he is to be totally excluded from giving his testimony; if he is competent, it will then be for the jury to decide whether his evidence, when given, is entitled to credit.

All persons are admissible witnesses who have the use of their reason, and such religious belief as to feel the obligation of an oath, and who are not disqualified in the manner hereafter mentioned. (f) The causes of incompetency, therefore, to be considered are—1. Defect of understanding. 2. Defect of religious belief. 3. Disqualification and therewith of the incompetency of husband and wife.

1. Persons incompetent from want of understanding. Idiots (g) are not admissible to give evidence. By the word 'idiot' is meant a fool or madman from his nativity, who never has any lucid inter-

(z) 2 Stark. Ev. 13. 2 Hale, P. C. 280, citing the case of Bilmere, Gray, and Harbin, 2 Roll. Abr. 685, pl. 3. Bath and Montague's case, cited in Lock v. Hayton, Fortesc. 246.

(a) 2 Hawk. P. C. c. 46, s. 98. R. v. Bedder, 1 Sid. 237. 2 Stark. Ev. 13.

(b) R. v. Fletcher, 1 Str. 633. R. v. Sherman, Cas. temp. Hardw. 308. 1 Phill. Ev. 68.

(c) R. v. George, C. & M. 111. See R. v. Lafone and others, 5 Esp. N. P. C. 155. 1 Phill. Ev. 68.

(d) R. v. Jackson, 6 Cox, C. C. 525. See *post*, p. 661.

(e) 2 Hale, P. C. 277.

(f) Per Lawrence, J., in *Jordaine v. Lashbrooke*, 7 T. R. 610.

(g) Com. Dig. Testmoign, A. 1.

## AMERICAN NOTE.

<sup>1</sup> See *Moss v. S.*, 17 Ark. 327. *Grimm v. P.*, 14 Mich. 300. *P. v. Newberry*, 20 Cal. 439. *Sloan v. S.*, 9 Ind. 565. *P. v. Donnelly*, 2 Parker, C. R. 182. *S. v. Ed-*

*wards*, 19 Mo. 674. *Ellege v. S.*, 24 Texas, 78. *S. v. Dunlap*, 65 N. C. 288. *S. v. Young*, 39 N. H. 283. *Strawhern v. S.*, 37 Miss. 422.

vals. (*h*) A person deaf and dumb from his nativity (though in presumption of law an idiot), (*i*) if he is capable of conversing by signs, and has a proper sense of the obligation of an oath, may be admitted as a witness and examined with the assistance of an interpreter. (*j*) But however intelligent and capable of communicating and receiving information by signs he may be, he cannot be admitted as a witness if it does not appear that he clearly understands the nature of an oath. (*k*) So lunatics are incompetent; that is, persons usually mad, but if they have intervals of reason (*l*) they are competent during those times. (*m*) And in such cases it is for the judge to determine whether the insane person has the sense of religion in his mind, and whether he understands the nature and the sanction of an oath, and then the jury are to decide on the credibility and the weight of his evidence. (*n*)

With respect to children,<sup>1</sup> the rule is that their competency does not depend on their age, but that a child of any age may be examined, if capable of distinguishing between good and evil; (*o*) but whatever be its age, it cannot be examined without being sworn. (*p*) Whether the infant be competent or not is a question for the discretion of the Court. (*q*) Before a child is examined the judge must be satisfied that the child feels the binding obligation of an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to it for the purposes of a trial. Where, therefore, on an indictment for murder it appeared that, previous to the happening of the circumstances, to which a child came to speak, she had had no religious education whatever, and had never heard of a future state, and she had been twice visited by a clergyman who had given her some instruction as to the nature and obligation of an oath, but she had no intelligence as to religion or a future state at the time of trial; her testimony was rejected. (*r*) There is no difference in respect

(*h*) See vol. i. p. 118.

(*i*) Ibid.

(*j*) *Ruston's case*, 1 Leach, C. C. 408.

(*k*) *R. v. O'Brien*, 1 Cox, C. C. 185, Jackson, J.

(*l*) Vol. i. p. 120.

(*m*) Com. Dig. Testmoign, A. 1.

(*n*) *R. v. Hill*, 2 Den. C. C. 254. See this case, *post*, p. 671.

(*o*) By such capability must be understood a belief in God, or in a future state of rewards and punishments; from which the Court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood, *ibid*. See *White's case*, 1 Leach, 430, 431. 'It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn.' Per Alderson, B., *R. v. Perkins*,

2 Moo. C. C. R. 135. As to the rule in former times, see *R. v. Travers*, 1 Str. 700. *R. v. Dannel*, 1 East, P. C. c. 10, s. 5, pp. 443, 444; 1 Hale, 302; 2 Hale, 278.

(*p*) *Brazier's case*, Reading Spring Ass. 1779. 1 East, P. C. c. 10, s. 5, pp. 443, 444. 1 Leach, 199, S. C. *Powell's case*, 1 Leach, 110. Bull. N. P. 293. See now, however, 48 & 49 Vict. c. 69, s. 4, *post*, p. 656, and 57 & 58 Vict. c. 41, s. 15, *ante*, p. 292.

(*q*) 1 Stark. Ev. 94.

(*r*) *R. v. Williams*, 7 C. & P. 321, Patteson, J. In *R. v. Holmes*, 2 F. & F. 788, Wightman, J., seems to have thought it sufficient to allow a child of six years old to be sworn, that to the question, 'Is it a good or bad thing to tell a lie?' the child answered, 'A bad thing.' But the following questions and answers were also put and

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<sup>1</sup> See *S. v. Whittier*, 21 Maine, 341. S. Cal. 66. *Washburne v. P.*, 10 Mich. 372. *v. Le Blanc*, 3 Brev. 339. *P. v. Bernal*, 10 Warner v. S., 25 Ark. 447.

of the competency of children between capital cases and misdemeanors. (s)

Where the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary for the purposes of justice to put off the trial of a prisoner, directing that the child in the meantime should be properly instructed. (t)

Where a criminal prosecution was coming on to be tried, and the learned judge found that the principal witness was a female infant, wholly incompetent to take an oath, he postponed the trial till the following assizes; and ordered the child to be instructed in the meantime, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. (u) And at the next assizes the prisoner was put upon his trial, and the infant, being found by the Court on examination to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony, and executed. (v) And where a bill was preferred against a prisoner for carnally knowing a girl under ten years of age, and the girl, being examined by Erle, J., before going before the grand jury, appeared to have no notion of religious or moral duties, and therefore was not sworn, and the bill was ignored in consequence; Erle, J., on the authority of the preceding case, directed the prisoner to be detained till the next assizes, and that the girl in the meantime should be duly instructed. (w)

It is entirely in the discretion of the Court whether the trial should be postponed for this purpose or not: and where the want of understanding the nature and obligation of an oath arose from no neglect, but from the child being only six years old, and therefore being too young to have been taught; Pollock, C. B., refused to postpone the trial, as he doubted whether the loss in point of memory would not more than countervail the gain in point of religious education. (x) But an application to postpone the trial on this ground ought properly to be made before the child is examined by the grand jury, or, at all events, before the trial has commenced; for if the jury are sworn,

given: 'Do you say your prayers?' 'Yes.' 'What becomes of a person who tells lies?' 'If he tells lies he will go to the wicked fire'; and the child was then sworn. And Wightman, J., admitted a child of about the same age, who answered the question, 'Is it a good or bad thing to tell a lie?' by saying it was a bad thing. Anonymous in the note, *ibid.*

(s) *R. v. Travers*, 2 Stra. 700.

(t) 1 Phill. Ev. 5. But this must not be done in order that an *adult* may become capable, *ibid.* *R. v. Wade*, R. & M. C. C. R. 86; *R. v. Whitehead*, 10 Cox, C. C. 234.

(u) *Anon. cor. Rooke*, J., at Gloucester, Rooke, J., mentioned the case on a trial at the Old Bailey, in 1795; and added, that upon a conference with the other judges, on his return from the circuit, they unanimously approved of what he had done. See note (a) to White's case, 1 Leach, 430; and 2 Bac. Abr. 577, in the notes.

(v) *Id. ibid.*

(w) *R. v. Baylis*, 4 Cox, C. C. 23. In *R. v. Williams*, 7 C. & P. 320, where on a trial

for murder, a child of eight years of age had been visited twice by a clergyman, who had given her some instruction as to the nature of an oath; Patteson, J., said, 'I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, and communicated to her for the purposes of this trial.'

(x) *R. v. Nicholas*, 2 C. & K. 246. Pollock, C. B., observed that he could easily conceive that there might be cases where the intellect of the child was much more ripened, as in the cases of children of nine, ten, or twelve years old, where their education had been so utterly neglected that they were wholly ignorant on religious subjects; and in these cases a postponement of the trial might be very proper.

and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should, if there is no other evidence of the offence having been committed, direct an acquittal. (*y*)

When the child is incompetent to be sworn, the account which it has given of the transaction to others is inadmissible. (*z*) By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), sec. 4, 'Where upon the hearing of a charge "of unlawfully and carnally knowing or attempting to know a girl under 13 years of age," (*a*) the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the Court or justices understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if in the opinion of the Court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused: Provided also that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn.'

2. Of incompetency from defect of religious belief. This would appear to be no longer a ground of incompetency, since by the Oaths Act, 1888 (51 & 52 Vict. c. 46), sec. 1, 'Every person objecting to be sworn, and stating as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief, (*b*) shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which if deposed on oath would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence and punishment in all respects as if he had committed wilful and corrupt perjury.'

2. 'Every such affirmation shall be as follows: "I, A. B., do solemnly, sincerely, and truly declare and affirm," and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.'

5. 'If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.'

(*y*) 1 Phill. Ev. 5, citing *R. v. Wade*, *ante*, p. 655.

(*z*) *R. v. Nicholas*, 2 C. & K. 246. 1 Phill. Ev. 5.

(*a*) For a similar provision in cases under the Prevention of Cruelty to Children

Act, 1894, see 57 & 58 Vict. c. 41, s. 15, *ante*, p. 292.

(*b*) A witness who states that he has a religious belief and that the taking of an oath is not contrary to that belief cannot be allowed to affirm. *R. v. Moore*, 17 Cox, 458.

The proper method, however, of administering the oath must vary according to that which the proposed witness himself considers most obligatory; (c) for 'as the purpose is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most.' (d) Therefore, a Mahometan should be sworn on the Alcoran; (e) a Jew on the Pentateuch, with his head covered; (f) a Gentoo according to his peculiar forms. (g) So a witness professing Christianity, but declining to swear on the New Testament, was allowed to be sworn on the Old Testament, upon stating that he should consider such oath binding on his conscience. (h) By the law of Denmark an oath is taken in all judicial proceedings by holding up three fingers of the right hand, to indicate the three persons of the Holy Trinity, and promising to speak the truth. (i) But although it is highly desirable that a witness should be sworn according to the form which he considers most binding on himself, yet, if he has taken the oath in the usual form administered in our courts of law, without objecting to it, and upon being questioned whether he considers the oath he has taken as binding on his conscience, he answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding on his conscience than that he has already used. (j) For if the witness says he considers the oath as binding on his conscience, he does, in effect, affirm that in taking that oath he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance on his head if what he shall afterwards say is false, and, having done that, it is perfectly unnecessary and irrelevant to ask any further questions. (k) And so where

(c) Willes's Rep. 549.

(d) By Lord Mansfield in *Atcheson v. Everitt*, Cowp. 389. And see *Miller v. Salomons*, 7 Exch. R. 475.

(e) *Morgan's case*, 1 Leach, 54.

(f) *Omichund v. Barker*, Willes, 543. 1 Phill. Ev. 9.

(g) 1 Phill. Ev. 9. 1 Chit. Crim. L. 591.

(h) *Edmonds v. Rowe*, R. & M. N. P. R. 77, *Bosanquet, Sergt.*

(i) *Boelen v. Melladew*, 10 C. & B. 898.

The first instance in which an oath is mentioned in the Bible is Gen. 14, v. 22, which ought to be translated, 'I have lifted up my hand to Jehovah;' but the like expression occurs frequently afterwards in the original, though sometimes it is otherwise translated in our version. Mr. Greaves, in the 4th edition of this work, remarks that 'A very remarkable distinction exists between the manner in which English and South Welsh witnesses now-a-days take the book at the time when they are sworn. An English witness always places his fingers under, and his thumb at the top of the book. A Welsh witness, on the contrary, places his three fingers at the top, and his thumb under the book, whilst his little finger does not touch the book at all. And I have often observed witnesses in the box let the book remain on the top of the box with their three fingers upon the book until the time to kiss it arrived, when they raised it from the box to

their lips. Now no doubt this practice originated from the ancient form of taking the oath with the hand raised in the manner above described, and which, in process of time, was changed first to laying the three fingers upon the book, and so taking the oath, and afterwards to raising the book and kissing it. There is no doubt that originally an oath was taken without touching anything; and Selden, vol. ii. p. 1467, plainly shews that such was the custom among the early Christians, but he also shews that the custom of touching the book was derived from the Pagans.' See 3 Inst. 165. *Jacob's Law D. (Oath)*. 2 Hale, P. C. 279. *Colt v. Dutton*, 2 Sid. R. 6. More information on the subject of oaths may be found in *Notes and Queries*, vol. viii. pp. 364, 471, 605; vol. ix. pp. 45, 61, 403; vol. x. p. 271; vol. xi. p. 232 (1st Ser.); and vol. ii. p. 293 (3rd Ser.).

(j) *The Queen's case*, 2 B. & B. 285.

(k) *Ibid.* See also *Sells v. Hoare*, 3 B. & B. 232, where, on an application for a new trial, it appeared that a witness who had been sworn as a Christian, on the Gospels, was a Jew; and the Court refused to grant a rule, being unanimously of opinion that the oath as taken was binding on the witness both as a moral and religious obligation: and *Richardson, J.*, observed, that if the witness had sworn falsely, he might be convicted of perjury under the oath he had taken.

a negro, who was called as a witness, stated before he was sworn that he was a Christian and had been baptised, it was held that he ought to be sworn without any other question being asked. (*l*)

The intercourse of nations must frequently give rise to the necessity of the sanction of an oath in matters that concern both; sometimes with reference to treaties into which they may enter, sometimes with reference to the administration of criminal or civil justice: the sanction of an oath, if valid at the place where taken, ought to be considered valid everywhere; just as marriage valid at the place where celebrated is (generally speaking) valid everywhere else; and as an oath is the personal act of the party taking it, if a witness be in a foreign land, his oath ought to be received as it would be received in his own country. In fact, a judicial oath (for justice is of all countries and climes) is governed by the law of nations; but an oath of office or of qualification is governed by the municipal laws of the state which requires it to be taken, and by those laws alone. (*m*) And in the case of oaths of office or of qualification, where the very form of the oath as well as the oath itself is prescribed by the Legislature, there the directions of the Legislature must be literally followed, and the oath must, and can only lawfully, be taken in the prescribed form, until that form be altered by the same authority which appointed it. (*n*)

The 1 & 2 Vict. c. 105, enacts, that 'In all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered: provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.'

By the 14 & 15 Vict. c. 99, s. 16, 'Every Court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

By the 13 & 14 Vict. c. 21, s. 4, In all Acts of Parliament 'the words "oath," "swear," and "affidavit," shall include affirmation, declaration, affirming and declaring, in the case of persons by law allowed to affirm instead of swearing.'

Where an oath is administered before a Court, judge, or magistrate, by a crier, clerk, or other person, the oath is in point of law administered by the Court, judge, or magistrate; for the person who actually administers the oath is the agent of the Court, judge, or magistrate, and when he administers the oath, the Court, judge, or magistrate administers it. (*o*)

(*l*) *R. v. Serva*, 2 C. & K. 53. *Platt*, B.

(*m*) *Per Pollock*, C. B. *Miller v. Salomons*, 7 Exch. R. 475.

(*n*) *Per Alderson*, B. *Ibid*.

(*o*) *R. v. Tew*, *Dears*. C. C. 429, where an objection that the oath was administered



A witness who is subpoenaed cannot object to be sworn on the ground that any questions which may be put to him would tend to criminate him; but he must be sworn, and must either answer the questions, or object to answer them, if he insists on any privilege in that respect. (*p*)

3. Disqualification, &c. Previous to the 53 Geo. 3, c. 127, there was great doubt whether persons excommunicated by the ecclesiastical courts were competent witnesses; (*q*) but by that statute excommunication is not to be pronounced except in certain cases; and by sec. 3, in those cases, parties excommunicated shall incur no civil disabilities.

The 6 & 7 Vict. c. 85, s. 1, reciting that 'the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in civil and in criminal cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony,' enacts 'that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime (*r*) or interest (*s*) from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law or by consent of parties authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, (*t*) or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence.' (*u*)

to the witnesses going before the grand jury by the crier in open court, whereas it ought to have been administered by the Clerk of the Peace, was held to be unfounded, frivolous, and discreditable. See the 19 & 20 Vict. c. 54, as to the grand jury swearing the witnesses.

(*p*) *Boyle v. Wiseman*, 10 Exch. R. 647.

(*q*) *Gilb. Ev.* 180.

(*r*) Before this Act if a person had been convicted of certain offences, he was incompetent to give evidence. But in order to exclude a person from being a witness on this account, it was necessary to produce the record, not only of his conviction, but of the judgment thereon. *Gilb. Ev.*

128. *Com. Dig. Testm. A. 5.* Outlawry in a personal action did not make a person incompetent as a witness. *Co. Litt. 6 b.*; *Com. Dig. Testm. A. 5.*<sup>1</sup>

(*s*) Before this Act persons having an interest in the event of a suit, were excluded from being witnesses in favour of that party to which their interest inclined them. As to the nature of the interest that excluded, see 1 *Phill. Ev.* 1 *Stark. Ev. Smith v. Prager*, 7 T. R. 60. But no relationship, except that of husband and wife, created a disqualifying interest.

(*t*) *Sic* — plainly a mistake for 'inquiry.'

(*u*) The clause then proceeded, 'Pro-

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<sup>1</sup> As to incompetency from crime in America see *C. v. Rogers*, 9 Metc. 500. *C. v. Keith*, 8 Metc. 531. *S. v. Ridgely*, 2 Har. & M'Hen. 120. But *contra* *U. S. v.*

*Brockins*, 3 Wash. C. C. 90. *S. v. Nanton*, 63 N. C. 294. *C. v. Green*, 17 Mass. R. 515. *S. v. Valentine*, 7 Ired. 225. *Uhl v. C.*, 6 Gratt, 706.

In one case since this Act Lush, J., said he considered a person under sentence of death was not a competent witness, but, if it became necessary, he would reserve the point. (*v*)

Where upon an indictment for felony two prisoners, who had pleaded guilty to the same indictment, were called as witnesses on the part of the Crown, and they had been previously convicted and sentenced for another and different offence; it was urged that they were incompetent, as they were incapable, as attainted felons, of being witnesses at common law, and as they were 'individually named upon the record' their competency was not restored by Lord Denman's Act (6 & 7 Vict. c. 85); but Rolfe, B., held that they were admissible. They could not be either gainers or losers by the event of the trial then proceeding, and they could not be considered as parties to the proceeding then before the Court. (*w*)

The 14 & 15 Vict. c. 99, s. 2, enacts 'that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.' (*x*)

Sec. 3. 'But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.' (*y*)

In any criminal proceeding defendants jointly indicted for or charged with the commission of any offence, and on their trial,

vided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively.' But the whole of this proviso, except so much as relates to husbands and wives, was repealed by the 14 & 15 Vict. c. 99, s. 1, and the remainder by the 16 & 17 Vict. c. 83, s. 4. The section also contains a proviso that it shall not repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 26, and a proviso as to the examination of defendants in courts of equity.

(*v*) R. v. Webb, 11 Cox, C. C. 133.

(*w*) R. v. Drury, 3 C. & K. 190. It will be observed that it was not even contended in this case that the prisoners were incompetent, excepting by reason of the proviso, and that proviso is now repealed.

(*x*) The 17 & 18 Vict. c. 122, s. 15, enacts that this section 'shall not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offence, or for the recovery of any penalty or forfeiture, under any law now in force, or hereafter to be made relating to the customs or inland revenue.'

(*y*) Sec. 4 provides that nothing in this Act shall apply to proceedings in consequence of adultery, or breach of promise of marriage; and sec. 5, that the Act shall not repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 26.

cannot be called as witnesses for or against themselves or each other, notwithstanding anything contained in the 14 & 15 Vict. c. 99, ss. 2 and 3. Four prisoners were jointly indicted for night poaching, and during their trial, and at the close of the case for the prosecution, it was proposed to call one of the prisoners to prove an *alibi* for another of them. The proposed witness had been examined before the justices on the committal of the other three prisoners, and had given evidence of an *alibi*, and had been bound over, by recognisance, by the justices to give evidence on the trial under 30 & 31 Vict. c. 85, s. 3, but had been afterwards taken into custody, and committed, and was indicted jointly with the others. No *nolle prosequi* was entered for him, nor did he plead guilty, and no application had been made for a separate trial. The evidence was rejected. Held, that the evidence was properly rejected, and that the conviction was right. (z) If two prisoners be jointly indicted, and one alone be given in charge to the jury, the other is an admissible witness (though neither acquitted nor convicted, and though a *nolle prosequi* is not entered) upon the trial of the prisoner with whom the jury are charged. (a)

Where one of several prisoners jointly indicted is acquitted, he is a competent witness against the others; (b) and it is equally clear that he is a competent witness for the others.

Where, before the 14 & 15 Vict. c. 99, George and Ford were jointly indicted for housebreaking, and George pleaded guilty, but was not sentenced; Coltman, J., held that he might be called as a witness for Ford. (c)

So where Hinks and Waywood were jointly indicted for larceny, and Waywood pleaded guilty, but judgment was respited in his case, and the trial proceeded against Hinks, and Waywood was admitted as a witness for the prosecution; it was held, upon a case reserved upon the question whether he was a competent witness under the 6 & 7 Vict. c. 85, s. 1, that he was admissible at common law. (d)

Where Jackson and Cracknell were jointly indicted for forgery, and Jackson, who was also charged with having been previously convicted of felony, pleaded guilty to the charge of forgery, but denied his previous conviction, and the jury found that he had been previously convicted; Erle, J., was of opinion that the proper course was to pass sentence upon him, and so put an end to the whole matter as regarded him, before he allowed him to give evidence for the other prisoner; and this course was adopted. (e)

Wherever it has been intended to call a prisoner as a witness

(z) *R. v. Payne*, 41 L. J. M. C. 65. Before this case there was some doubt about this. See 1 Hale, 305; 2 Stark. Ev. 11. See Sir Percy Cresby's case, Noy, 154, cited 2 Hale, 234. *R. v. Lyons*, 9 C. & P. 555. *R. v. Deeley*, 11 Cox, C. C. 607.

(a) *Winsor v. R.*, 35 L. J. M. C. 161; see this case *ante*, p. 645. See *R. v. Gallagher*, 13 Cox, C. C. 61.

(b) *R. v. O'Donnell*, 7 Cox, C. C. 337, five judges on a case reserved in Ireland.

(c) *R. v. George*, C. & M. 111. *R. v. King*, 1 Cox, C. C. 232, Platt, B., after

consulting Erle, J. *R. v. Arundel*, 4 Cox, C. C. 260, Patteson, J.

(d) *R. v. Hinks*, 1 Den. C. C. 84. 2 C. & K. 462. S. C. as *R. v. Williams*, 1 Cox, C. C. 289. The only observation as to the 6 & 7 Vict. c. 85, was made by Alderson, B., in answer to the statement that Waywood was a party individually named in the record, who said that he was not a party to the issue. *Hawkesworth v. Showler*, 12 M. & W. 45.

(e) *R. v. Jackson*, 6 Cox, C. C. 525.

against those jointly indicted with him, the practice has been to obtain the leave of the Court to offer no evidence against the particular prisoner, and to take an acquittal of him before examining him as a witness. (*f*)

The 16 & 17 Vict. c. 83, s. 1, enacts that 'on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.'

Sec. 2. 'Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.' (*g*)

Sec. 3. 'No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage.' (*h*)

With the exceptions hereafter pointed out, husband and wife have always been incompetent to give any evidence for or against each other in criminal cases; (*i*) therefore the wife of a prisoner cannot give evidence for him.

And they cannot be witnesses against each other,<sup>1</sup> by reason of the dissensions and distrusts that it would occasion, inconsistent with the happiness of married life and the peace of families; (*j*) and therefore, on an indictment for bigamy, the first and true wife cannot be admitted to give evidence against her husband; (*k*) but, after proof of the first marriage, the second wife may be a witness. (*l*) And where an offence can only be committed by several joining in it, as conspiracy or riot, the husband or wife of

(*f*) R. v. Rowland, R. & M. N. P. R. 401. R. v. Owen, 9 C. & P. 83; *ante*, p. 644.

(*g*) So much of this section as is contained in the words 'or in any proceeding instituted in consequence of adultery' are repealed by 32 & 33 Vict. c. 68, s. 1.

(*h*) Sec. 4 repeals so much of sec. 1 of the 6 & 7 Vict. c. 85, as provides that the Act shall not render competent the husbands and wives of the parties therein enumerated.

(*i*) Gilb. Ev. 119. 2 Hawk. P. C. c. 46, s. 70. A statement made by the wife in the presence of her husband is of course admissible in evidence against him. R. v. Mallory, 18 Q. B. D. 33.

(*j*) Gilb. Ev. 119. 2 Hawk. P. C. c. 46, s. 70. Barker v. Dixie, Cas. temp. Hardw. 264.

(*k*) Vol. i. p. 715.

(*l*) Wells v. Fisher, 1 M. & Rob. 99.

#### AMERICAN NOTE.

<sup>1</sup> Stein v. Bowman, 13 Peters, 209. S. v. M'David, 15 La. Ann. 403. Enos v. Hunter, 4 Gilm. 211. S. v. Bradley, 9 Rich. (Law) 168. S. v. Wilson, 2 Vroom.

77. P. v. Northrup, 50 Barb. 147. Lingo v. S., 29 Geo. 470. M'Gwin v. Maloney, 1 B. Mon. 225. Stewart v. Johnson, 3 Harrison, 88.

one of those who are jointly indicted has always been an incompetent witness for or against any of the others; for the acquittal or conviction of such other would directly tend to the acquittal or conviction of the wife or husband, as the case might be. Thus on a prosecution against several persons for a conspiracy, the wife of one of the defendants was held not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for her husband. (*m*) And wherever the acquittal of the principal would enure to the accessory's discharge, it may well be doubted whether the wife or husband of the accessory would have been a competent witness for the principal.

On an indictment for conspiracy against Hamp and others, Mrs. Broome was examined for the prosecution, and it appeared that her husband had been bound by recognisances to appear and take his trial for cheating at play at a previous assize, but that he did not appear, and had not returned home since, and the wife being asked whether she had not seen her husband in Birmingham a few days before, said, 'I decline to answer the question, because my husband did not appear to his recognisance;' Lord Campbell, C. J., 'I think on that the question ought not to be proposed.' (*n*)

The wife of one of several prisoners on their trial at the same time on a joint indictment cannot be called as a witness for or against any of the prisoners, notwithstanding that the indictment contains more counts than one respectively charging distinct offences. (*o*) And where upon an indictment against Webb and three other prisoners for sheep-stealing the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners that the wife of one prisoner was incompetent to give evidence for or against the other prisoners; but Bolland, B., held that the witness was incompetent. (*p*)

In a civil case Lord Hardwicke would not suffer a wife to give evidence for her husband, even by consent of the other party. (*q*) And even after a divorce by Act of Parliament, the wife is not competent in an action against her husband to give evidence of anything that happened during coverture, (*r*) on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation. (*s*) The rule, however,

(*m*) Vol. i. p. 528. *R. v. Frederick*, 2 Str. 1095. *R. v. Smith*, R. & M. C. C. R. 289. See *Rudd's case*, 1 Leach, 127.

(*n*) *R. v. Hamp*, 6 Cox, C. C. 167.

(*o*) *R. v. Thompson*, 41 L. J. M. C. 112; 12 Cox, C. C. 202. Before this case there was some doubt about this. See *R. v. Payne*, *ante*, p. 661. *R. v. Sills*, 1 C. & K. 494, July, 1844. *R. v. Moore*, 1 Cox, C. C. 59, August, 1848. *R. v. Bartlett*, 1 Cox, C. C. 105, April, 1844. *R. v. Denslow*, 2 Cox, C. C. 230, A.D. 1847.

(*p*) *R. v. Webb*, Bushell, J., and T. Croome, Gloucester Spr. Ass. 1880. MSS.

C. S. G.; and see *Dalt. c. 164*, p. 540, cited 1 Hale, 301.

(*q*) *Cas. temp. Hardw.* 264.

(*r*) *Monroe v. Twisleton*, Peake Ev. Appendix. So a widow cannot be called by the defendant to disclose conversations between herself and her late husband, in an action by his executors. *Doker v. Hasler*, R. & M. N. P. R. 198, ruled by Best, C. J. But see *Beveridge v. Minter*, 1 Carr. & P. 364.

(*s*) By Lord Ellenborough, in *Aveson v. Kinnaid*, 6 East, 192.

must be understood as applying to cases where the husband or wife are directly accused of a crime, and not as extending in the same degree to collateral suits or proceedings between third persons. It was, indeed, once held, in *R. v. Olviger*, (t) that husband and wife in collateral cases are not to be permitted to give any evidence that might even tend to criminate each other; for though the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended. And the principle of that decision would extend to prevent the one from being called to contradict the other; for the tendency of the evidence of the latter witness would be to prove the former guilty of perjury. (u) But the rule laid down in the case of *R. v. Olviger* was much discussed in the case of *R. v. All Saints, Worcester*, (v) in which the Court of King's Bench was of opinion that it had been expressed in terms too large and general; and held, that where the evidence of the wife did not directly criminate the husband (as in a proceeding relating to other matters, and not to any criminal charge against him), and never could be used against him, nor could he ever be affected by the judgment of the Court founded upon such evidence, she was a competent witness.

So where upon the trial of an appeal a pauper proved his marriage with E., and M. B. was then called by the other side to prove that she had previously been married to the pauper; it was held that she was competent for this purpose; as nothing that was said by her in this case, nor any decision of the Court of Sessions founded upon her testimony, could afterwards be received in evidence to support an indictment against her husband for bigamy. (w)

But where on an indictment for stealing wheat, Eliza Ellis was called on the part of the Crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton, J., doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband by causing a charge to be made against him. The two preceding cases were then cited. Taunton, J., 'I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale.' (x) In *R. v. All Saints, Worcester*, at the time when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately.' Having consulted Littledale, J., the learned judge added, 'We both agree in opinion that the witness is incompetent. We think *R. v. All Saints, Worcester*, very distinguishable. There at the time when the wife was examined there was nothing in her evidence to criminate her husband. Here the evidence would directly charge the husband with being a principal; and although

(t) 2 T. R. 263.

(u) 2 T. R. 268.

(v) 6 M. & S. 194.

(w) *R. v. Bathwick*, 2 B. & Ad. 639. The Court doubted whether the competency of a witness could depend upon the marshalling the evidence, or the stage of

the cause at which the witness was called. See Peat's case, 2 Lewin, 288, vol. i. p. 715.

(x) I am not aware of the passage referred to by the learned judge, but see 2 Hale, P. C. 279, 1 Hale, P. C. 301. C. S. G.

there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received.' (y)

But where the first count charged Halliday with obtaining money by falsely pretending that a document produced to a bank by Eliza, the wife of D. Thomas, had been filled up by his authority; the second count was similar as to another document; and the third count charged Halliday and Eliza Thomas with a conspiracy to cheat the bank; but she was not tried with Halliday. The evidence of D. Thomas was essential to prove that he had given no authority to fill up the documents; but it was objected, on the authority of the preceding case, that he was incompetent to prove his wife guilty of a conspiracy, or even to prove the counts for false pretences; but Byles, J., thought his evidence admissible on all the counts; and the jury found the prisoner guilty on the first count only; and, on a case reserved, it was held that the evidence of the husband was admissible in support of the first count. His evidence no doubt tended to shew that his wife had acted criminally, but that count contained no charge against her. (z)

Where, however, the husband has either been convicted or acquitted of the same felony, respecting which the wife is called as a witness, she is competent to be examined. Thus, on an indictment for sheep-stealing, the wife of a person who had been previously convicted of stealing the same sheep, was held a competent witness for the prosecution. (a) So where one prisoner pleaded guilty, it was held that his wife was a competent witness against the other prisoner jointly indicted with him, as on the issue to be tried her husband was no longer interested. (b) So where a wife and her paramour were jointly indicted for stealing the goods of the husband, it was held that the husband was a competent witness against the paramour; for the wife was entitled to be acquitted, as she could not be guilty of stealing her husband's goods. (c) And in *Thurtell's case*, Mrs. Probert was examined as a witness against Thurtell after her husband was acquitted. (d) In the same manner if Probert had not been apprehended, and Thurtell only had been on trial at the time, the wife of Probert would have been capable of being examined; because the question would have been whether Thurtell was guilty, and not whether Thurtell and Probert were guilty. (e)

And the reasoning upon which the decision in *R. v. All Saints, Worcester*, was founded, is equally strong to shew that one may be

(y) *R. v. George Gleed*, Gloucester Lent Ass. 1832. MSS. C. S. G.

(z) *R. v. Halliday*, Bell, C. C. 257. The Court seem to have considered the wife competent on all the counts, as Pollock, C. B., added, 'Indeed, in this indictment she was not charged at all, although she was involved in the conspiracy charged in the third count; but that did not prevent the husband's evidence from being admissible.' This case was not argued, and no

previous decision referred to when it was decided.

(a) *R. v. Williams*, 8 C. & P. 284. Alderson, B.

(b) *R. v. Thompson*, 3 F. & F. 824, Keating, J.

(c) *R. v. Glassie*, 7 Cox, C. C. 1. Lefroy and Monahan, CC. JJ.

(d) Per Alderson, B., *R. v. Williams*, *supra*.

(e) Per Alderson, B., *Hawkesworth v Showler*, 12 M. & W. 45.

called as a witness to disprove what has been stated by the other, and that either the party who has called the one, or the opposing party, may call the other for the purpose of contradicting. (*f*)

Upon an indictment for forcible abduction and marriage of a woman, she may be a witness for the Crown, (*g*) or the prisoner; (*h*) but this is rather a case which does not fall within the general rule than an exception to it; for she is not legally his wife, a contract obtained by force having no obligation in law. (*i*) Indeed, if the actual marriage is valid (as where the woman after abduction consents to the marriage voluntarily, and not induced by any precedent menace), or if the marriage has been ratified by subsequent voluntary cohabitation, it has been said she is not competent for or against the prisoner. (*j*) But there are very considerable authorities to the contrary. (*k*) And in one case, where the defendants were indicted for a misdemeanor, in conspiring to carry away a young lady under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another count, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; Hullock, B., was of opinion that, even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. (*l*)

The wife is also admitted as a witness against her husband *ex necessitate*, in a prosecution of him for offences against her person. (*m*) So her dying declarations are admissible against him in the case of murder. (*n*) In an indictment of William Whitehouse, (*o*) at Stafford, upon Lord Ellenborough's Act, for shooting at his wife, she was admitted as a witness for the prosecution by Garrow, B., after consulting Holroyd, J., upon the ground of the necessity of the case; and Holroyd, J., sent Garrow, B., the case of *R. v. Jagger*, Yorkshire Assizes, 1797, where the husband had attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband; and Rooke, J., afterwards delivered the opinion of the twelve judges that the evidence had been rightly admitted. Hol-

(*f*) 1 Phill. Ev. 80, 7th ed.

(*g*) Gilb. Ev. 120. 1 Hale, P. C. 301, 302. 2 Hawk. c. 46, s. 78. Fulwood's case, Cro. Car. 488. Brown's case, 1 Vent. 243. Swendsen's case, 5 St. Trials, 456.

(*h*) *R. v. Perry*, at Bristol, 1794, cited by Abbott, C. J., in *R. v. Sergeant, R. & M. N. P. C. 354*. 1 Hawk. P. C. c. 41, s. 13.

(*i*) Gilb. Ev. 120. 1 Hale, P. C. 302, 660, 661. Bull. N. P. 286.

(*j*) 1 Hale, P. C. 302, 661. 1 Phill. Ev. 84, 7th ed. 2 Stark. Ev. 553.

(*k*) 4 Blac. Com. 209. 1 East, P. C. c. 11, s. 5, p. 454.

(*l*) *R. v. Wakefield*, see the trial, published by Murray, p. 257. 2 Lewin, 1 & 279. In *Perry's case*, *supra*, no force was used. See per Hullock, B., in *R. v. Wakefield*. In this case it was contended that

the wife's incompetency might be shewn either by examining her on the *voire dire*, or by other witnesses, and for the defendant it was proposed to shew her incompetency by other witnesses. Hullock, B., ruled that as this was a point of practice, and he saw some inconvenience in not calling her, which would not exist if she were called, she should be called.

(*m*) Lord Audley's case, 1 St. Tr. 393. This case has been denied to be law, but is now established by the highest authorities. 1 Hale, P. C. 301. 2 Hawk. P. C. c. 46, s. 77. Bull. N. P. 287. *R. v. Sergeant, R. & M. 354*. *R. v. Jellyman*, 8 C. & P. 604. 1 East, P. C. c. 11, s. 5, p. 455.

(*n*) Woodcock's case, 1 Leach, 500. John's case, *ibid.* 504, n. (*a*).

(*o*) MSS. Russell, Sergt.



royd, J., however, said he thought the wife could only be admitted to prove facts which could not be proved by any other witness. (*p*) So on an indictment against a man for beating his wife, she was held competent. (*q*) And the wife is always permitted to swear the peace against her husband. (*r*) And her affidavit has been permitted to be read on an application to the Court of King's Bench for an information against the husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (*s*) And it seems to be now settled, that in all cases of personal injuries committed by the husband and wife against each other, the injured party is an admissible witness against the other. (*t*)

But this rule seems to be confined to cases where the charge affects the liberty or the person of the wife. Thus it has been decided that in an indictment for a conspiracy in procuring a lady, then a ward in Chancery, to marry, the wife was not a good witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband; (*u*) and since she could not be admitted in favour of her husband, it follows necessarily that she could not be a witness against him. (*v*) So on an indictment against the wife of W. S. and others, for a conspiracy in procuring W. S. to marry, Abbott, C. J., refused to admit W. S. as a witness in support of the prosecution. (*w*) So a wife is not admissible as a witness against her husband on a charge of deserting her and her children against the 5 Geo. 4, c. 83. (*x*)

In any criminal proceedings by husbands or wives against each other under the Married Woman's Property Act, 1882, for taking the property of the other when leaving or deserting, or about to leave or desert that other, the husband and wife, respectively, shall be competent and admissible witnesses, and except when defendant, compellable to give evidence. (*y*)

By various enactments the evidence of a defendant, and of the wife or husband of the defendant, is made admissible.

By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), sec. 20, 'Every person charged with an offence under this Act, or under sec. 48 (which deals with rape) or secs. 52 to 55, both inclusive of 24 & 25 Vict. c. 100 (which deal with abduction), or any of such sections, and the husband or wife of the person so charged shall be competent, but not compellable witnesses on every hearing at every stage of such charge except an enquiry before a grand jury.'

(*p*) See *R. v. Pearce*, 9 C. & P. 667. S. P.

(*q*) By Lord Raymond on the authority of Lord Audley's case, *R. v. Azire*, 1 Stra. 633. Bull. N. P. 287.

(*r*) Bull. N. P. 287.

(*s*) Lady Lawley's case. *Ibid*.

(*t*) 1 East, P. C. c. 11, s. 5, p. 455. In the Wakefield's case, p. 257, Hullock, B., said, 'I take it, it is quite clear now that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person.'

(*u*) *R. v. Locker*, 5 Esp. 107.

(*v*) *R. v. Sergeant, R. & M.* 354.

(*w*) *R. v. Sergeant, R. & M.* N. P. R. 352. But it is not necessary, it should seem, that there should be *force* employed in order to make the husband or wife competent. In the case of the Wakefields before mentioned for abduction, Hullock, B., was of that opinion, and he mentioned that he had seen a report of the case of *R. v. Perry*, tried before Gibbs, C. J., as Recorder of Bristol, where the wife was held competent, and that no force was used in the abduction in that case.

(*x*) *Reeve v. Wood*, 10 Cox, C. C. 58.

(*y*) 45 & 46 Vict. c. 75, s. 12, 47 Vict. c. 14, s. 2.

The above section, by alluding to sec. 52, renders a person charged with an indecent assault a competent witness; and does not apply to a charge of common assault; but where a prisoner was acquitted of an indecent assault, but convicted of a common assault, although he gave evidence, the conviction was held right. (z)

By the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), sec. 10, 'In any prosecution for an offence against this Act a defendant and his wife, or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and if called shall be sworn and examined, and may be cross-examined, and re-examined in like manner as any other witness.'

By the Libel Act, 1888 (51 & 52 Vict. c. 64), sec. 9, 'Every person charged with the offence of libel before any court of criminal jurisdiction, and the husband or wife of the person so charged shall be competent but not compellable witnesses on every hearing at every stage of such charge.'

By 40 Vict. c. 14, 'On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river or bridge, and of any other indictment or proceeding instituted for the purpose of obeying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence.'

By sec. 4 of the Explosive Substances Act, 1883 (see *ante*, p. 303), 'In any proceeding against any person for a crime under this section' (which relates to the possession of explosive substances under suspicious circumstances) 'such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined and cross-examined as an ordinary witness in the case.'

By sec. 53 (2) of the Corrupt Practices Act, 1883 (see Vol. I. p. 452), 'On any prosecution under this Act whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under this Act, the person prosecuted or sued, and the husband or wife of such person may, if he or she think fit, be examined as an ordinary witness in the case.'

In a recent case before Wills, J., under 52 & 53 Vict. c. 44, which by sec. 7 allowed a husband and wife to give evidence for or against each other, a husband and wife were jointly indicted for cruelty to their child. At the conclusion of the prosecution counsel for the husband submitted that no case had been made against him, and the judge so held; but the wife electing to give evidence on her own behalf, the judge declined to allow the husband to be discharged, on the ground that the case was not over, and the husband must take his chance of the wife's evidence making against him. (a)

By the Betting and Loans (Infants) Act, 1892 (55 Vict. c. 4), sec. 6, 'In any proceeding against any person for an offence under this Act, such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.' (aa)

(z) *R. v. Owen*, 20 Q. B. D. 829.

(a) *R. v. Martin*, 17 Cox, C. C. 36. The section is repealed and re-enacted by 57 & 58 Vict. c. 41, s. 12, *ante*, p. 291.

(aa) A similar provision is contained in the Corrupt Practices Act, 1895 (58 & 59 Vict. c. 40), sec. 2.

Whether a woman who has cohabited with a man as his wife, but who is ready to swear she is not married to him, will be allowed to give evidence on the part of the man, has been considered a doubtful question. (b) But it seems now to be settled that the rule relates to persons who have entered into the relation of husband and wife; and does not extend to those who, not being married, have lived together and cohabited as man and wife. (c) Thus where a woman had been married to a man whom she had not seen for thirty years, and then married again, but afterwards found that the man she had first married was alive; as the second marriage was a mere nullity, she was held competent to give evidence of statements made by her second husband during the time they cohabited. (d) So where the prisoner had married his deceased wife's sister, Erle, J., held that the wife was a competent witness against him, as the marriage was void, and that the wife might prove her relationship to the former wife on the *voire dire*. (e) So a kept mistress, who has passed by the name and appeared in the world as the wife of her protector, has been held to be a competent witness for him. (f)

In the case of *R. v. Perry*, Gibbs, C. J., stated that he could see no distinction between admitting a wife for or against her husband. '*R. v. Perry*,' said Abbott, C. J., in *R. v. Sergeant*, (g) 'was much talked about at the time, and Gibbs, C. J., expressed his surprise that any doubt should have been entertained that a wife was in all cases a competent witness for her husband when admissible against him.'

Anciently the rule was, that if there were any objection to the competency of a witness, he should be examined on the *voire dire*, (h) and it was too late after he was sworn in chief (i) But for the convenience of the Court, and the furtherance of justice (as the incompetency may not at first be suspected), the rule is now so far relaxed that if it is discovered during any part of the witness's examination, or even after his cross-examination, that he is incompetent, the objection may be taken, and his evidence will be struck out. (j) But it seems that the objection comes too late after the

(b) *Campbell v. Twemlow*, 1 Price, 81. Per Richards, B., 1 Price, 83.

(c) 1 Phill. Ev. 69.

(d) *Wells v. Fletcher*, 5 C. & P. 12. S. C. as *Wells v. Fisher*, 1 M. & Rob. 99.

(e) *R. v. Young*, 5 Cox, C. C. 296. See *R. v. Chadwick*, 11 Q. B. 173. *R. v. Blackburn*, 6 Cox, C. C. 333.

(f) *Batthews v. Galindo*, 4 Bing. 610. *R. v. Young*, 2 Cox, C. C. 291, Erle, J. S. P.

(g) *R. & M. N. P. R.* 354.

(h) The *voire dire* is, when it is prayed upon a trial at law that a witness may (previously to his giving evidence in the cause) be sworn to *speake the truth* (in old French *voire dire*) whether he shall lose by the matter in controversy. Blount's Law Dictionary.

(i) *Turner v. Pearte*, 1 T. R. 719.

(j) *Jacobs v. Leybourn*, 11 M. & W. 685. 1 Phill. Ev. 153. *Turner v. Pearte*, 1 T. R. 720. *Howell v. Lock*, 2 Campb. 16. *Stone v. Blackburn*, 1 Esp. 37. *Perigal v. Nichol-*

*son*, Wightw. 64. But where upon a trial for high treason it appeared, after a witness had been examined for the Crown, without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the 7 Ann. c. 21, s. 14, to be given to the prisoner previous to his trial, the Court would not permit the evidence of the witness to be struck out; but said, the objection ought to have been taken in the first instance; otherwise a party might take the chance of getting evidence which he liked, or, if he disliked the testimony, he might then get rid of it on the ground of misdescription. *R. v. Watson*, 2 Stark. N. P. C. 158. And upon this ground, Mr. Starkie expressed his opinion that a party who was cognisant of the interest of a witness at the time he was called, was bound to make his objection in the first instance. 1 Stark. Ev. 137; and see 1 Phill. Ev. 154, note (3), and *Hartshorne v. Watson*, 5 Bing. N. C. 477.

witness has left the box ; (*k*) and it has been held that after a witness has been dismissed without any objection to his competency, it is not allowable to call a witness to prove his incompetency. (*l*) With respect, however, to the power of questioning a witness for the purpose of discovering his incompetency, there is still a material difference, which will presently be pointed out, between an examination on the *voire dire* and one after the witness has been sworn in chief.

The party against whom a witness is called may examine him respecting his competency on the *voire dire*, or may call another witness and produce other evidence in support of the objection. (*m*) The old rule is said to have been, (*n*) that if the witness were examined by the opposite party as to the fact of the objection, and denied it upon his oath, the party would not be at liberty to call afterwards another witness to prove it, in order to repel him from giving evidence, unless the other side acquiesced. But the modern and more convenient practice seems to be, that if the fact of incompetency is satisfactorily proved, the witness will be incompetent, although he may have ventured to deny it on the *voire dire*. (*o*)

It is now, however, clearly settled that, where a question arises as to the competency of a witness before he is sworn, the proper course is to receive all the evidence upon the question, both to impeach the competency of the witness and in support of it, before he is allowed to give any evidence. Thus in a case at York, where a witness was objected to by a prisoner as incompetent on the ground that he was insane, and the question arose as to the mode to be adopted under such circumstances ; Parke, B., consulted the judges upon it before he went the circuit, and they were of opinion that it ought to be tried on the *voire dire*, and evidence admitted both on the part of the prisoner and on the part of the prosecution to impeach the competency of the witness, and in support of it ; (*p*) and it has since been held that where an objection is raised to the competency of a witness on the ground that he is insane, it is for the Court to decide whether such person has the sense of religion on

(*k*) 1 Phill. Ev. 153. *Beeching v. Gower*, Holt, N. P. R. 314.

(*l*) *Dewdney v. Palmer*, 4 M. & W. 664.

(*m*) Per Hullock, B., *Wakefields' case*, p. 157. 2 Lew. 279.

(*n*) By Lord Hardwicke in Lord Lovat's case, 9 St. Tr. 647. See also the observations of Parker, C. J., in *R. v. Muscot*, 10 Mod. 193, in which case it was held that in criminal cases there could be an examination on the *voire dire*.

(*o*) 1 Phill. Ev. 154. In several cases it seems to have been considered that it is in the discretion of the judge whether other evidence should be called to support the objection before the witness is examined. And if the judge refuse to allow it to be then given, it seems that it may be given as part of the case of the party raising the objection, and if it support the objection, then the evidence of the witness objected to may be struck out of the notes. *R. v. Wakefield*, note (*a*), M. & Malk. 197.

*Jones v. Fort, M. & Malk.* 196. In this case the question was whether the defendant's examination taken under a commission of bankrupt was admissible, and Lord Tenterden, C. J., refused to allow evidence to be given tending to shew that from the mode of taking it, and the state of the defendant's health, it was inadmissible before the examination was read, but held that it might be received in the defendant's case, and if the objection was supported, the evidence might be struck out. It certainly, however, is much the more convenient course, as well for the purpose of saving time, as to prevent the jury from being influenced by inadmissible evidence, to receive the evidence before the examination of the witness. C. S. G.

(*p*) Anonymous, stated by Parke, B., in *Attorney-General v. Hitchcock*, 1 Exch. R. 91, and also in *Bartlett v. Smith*, 11 M. & W. 483.

his mind, and whether he understands the nature and sanction of an oath; and in order to determine these questions, he may be examined and cross-examined, and witnesses on both sides may be examined, in order to found and to meet the objection to his competency before he himself is sworn. (q) If the Court decides that he is a competent witness, 'then the jury are to decide on the credibility and weight of his evidence.' (r)

In one case, however, it has been intimated that in every case where any question is raised about the competency of a witness after he has been sworn and partly examined, there ought properly to be an inquiry made of the witness, who should be sworn 'to make true answer to all such questions as the Court should demand of him;' in other words, that an examination on the *voire dire* may be instituted at any period of the examination. (s)

On a prosecution for rape it appeared that the prosecutrix was deaf and dumb; and her father, who was sworn to interpret her evidence, said that he believed her to be ignorant of the nature of an oath. An expert, however, came, and from his report to the Court the prosecutrix was sworn, and her evidence taken down as interpreted by the expert. In the course of her examination it became apparent that she did not understand the questions, and that her answers could not be relied upon. The judge directed her to stand down, and struck out her evidence from the case: Held,

(q) *R. v. Hill*, 2 Den. C. C. 254.

(r) Per Lord Campbell, *ibid.*

(s) Per Lord Abinger, C. B., and Rolfe, B. *Jacobs v. Leybourn*, 11 M. & W. 685. In *Cleave v. Jones*, Hereford Sum. Ass. 1849, MSS. C. S. G., the plaintiff's counsel, in order to take the case out of the Statute of Limitations, tendered an account in the defendant's handwriting; and Rolfe, B., held that the defendant's counsel might at once put in two letters written by the plaintiff to the defendant, in order to shew that the account was a confidential communication by the defendant to the plaintiff as her attorney. So on a subsequent trial of the same cause, when the same account was tendered in evidence, the counsel for the defendant claimed the right to interpose, and put in a letter of the plaintiff, and to call a witness to shew that the account was written out and sent by the defendant to the plaintiff in consequence of such letter; and Erle, J., held that this might be done; and upon the defendant's counsel insisting that the witness ought to be sworn on the *voire dire*, Erle, J., held that that was the proper course, as the question whether the account was a privileged communication was to be determined by himself; and the letter and evidence of the witness were received, and the account rejected as a privileged communication. *Cleave v. Jones*, Hereford Sum. Ass. 1851; and the Court of Exchequer held that this ruling was correct. 7 Exch. R. 421. In an action by the payee against the maker of a promissory note, payable 'two' months after date, with a plea that the de-

fendant did not make the note, the defendant's signature to the note was proved; but the word 'two' was evidently written on an erasure. Erle, J., said that it was incumbent on the plaintiff to explain this, and a witness was called for the plaintiff to prove that the note was in the same state when it was signed by the defendant. Before the note was read, it was proposed, on the part of the defendant, to call witnesses to prove that, when the note was signed by the defendant, it was payable 'three' months after date; it was objected that this evidence should be given as part of the defendant's case; but Erle, J., at once received the evidence of two witnesses for the defendant, and upon their evidence decided that the alteration was not accounted for to his satisfaction. *Painter v. Hill*, 2 C. & K. 924, note. And where a witness for a plaintiff, being about to state the contents of a letter, a letter was put in his hands by the defendant's counsel, and he did not admit it to be the same; and the judge held that the defendant could not at that stage of the cause give evidence that it was the original; the Court held that this was erroneous, and that the judge was bound at once to hear the evidence on both sides, and decide whether the document was the original; and Parke, B., said, 'It is now well settled that all these preliminary questions, on which the reception of evidence depends, ought not to be submitted to the jury, but must be decided by the judge himself.' *Boyle v. Wiseman*, 11 Exch. R. 360; and see Campbell's case, *ante*, p. 358.

that although the prosecutrix had been sworn, the judge acted rightly in striking out and withdrawing her evidence from the jury. (t)

Every question respecting the competency of a witness is to be determined by the Court and not by the jury. (u)

An examination on the *voire dire* is allowed to be conducted without strict regard to the general rule of evidence, which requires the best possible proof of a fact, and admits no other. Thus a witness may be examined as to the contents of a written document without a notice to produce; (v) for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection. (w) And the same relaxation is allowed in removing an objection of incompetency as in raising it. Thus where in an action brought by a chartered company, a witness for the plaintiffs admitted on the *voire dire* that he had been a freeman of the company, but added that he was then disfranchised; Lord Kenyon ruled that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. (x) So where, before the 6 & 7 Vict. c. 85, a witness was objected to as next of kin in an action by an administrator, but on re-examination answered that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (y)

But it is only on the *voire dire* that the general rules of evidence are thus relaxed; for although objections to the competency of a witness may now be made at any stage of the trial, yet they are not to be attended with the privileges of an examination upon the *voire dire*. (z) So where a party, who calls a witness, attempts to remove the objection by other independent proof, and not on the *voire dire*, he will then be subject to all the general rules of evidence. (a) So where the objection is not raised on the *voire dire*, but appears in evidence in any other manner, the other party in answering it is bound by the usual rules of evidence. (b)

It is no objection against a person giving evidence for or against

(t) R. v. Whitehead, 10 Cox, C. C. 234.

(u) R. v. Hill, 2 Den. C. C. 254, and see *supra*, note (s).

(v) Howell v. Locke, 2 Campb. 15.

(w) See Butler v. Carver, 2 Stark. R. 434. On the passage in the text being cited in Macdonnell v. Evans, 11 C. B. 987, Maule, J., said, 'In many cases witnesses are called whom the opposite party has no reason to expect to see; the reason, therefore, given in that book is not a good one. An examination on the *voire dire* is for the purpose of establishing something of which the court is to be the judge and not the jury. It may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' Either the 'no' or 'not' in italics seems inserted by mistake in the report.

(x) Butchers' Company v. Jones, 1 Esp. 162. See also Botham v. Swingler, 1 Esp. 164. S. C. Peake, N. P. C. 219, where before 6 & 7 Vict. c. 85, the witness was

allowed to remove an objection of interest raised on the *voire dire* by his own statement that he had become a bankrupt, and his estate had been assigned. See also R. v. Gisburn, 15 East, 57. So where a bankrupt, before the above Act, called as a witness, stated on the *voire dire* that he had obtained his certificate and released his assignees; J. A. Park, J., held him competent, without production of the release. Carlisle v. Eady, 1 C. & P. 234. See also Bunter v. Warre, 1 B. & C. 689.

(y) Ingram v. Dade, MS. 1 Phill. Ev. 155. Lunniss v. Row, 10 A. & E. 606, overruling Goodhay v. Hendry, M. & Malk. 319, and a case in a note, *ibid.* 321. See 1 Phill. Ev. 156.

(z) Howell v. Lock, 2 Campb. 14.

(a) Corking v. Jarrard, 1 Campb. 37.

(b) Botham v. Swingler, 1 Esp. N. P. C. 165, by Lord Kenyon; but see Cleave v. Jones, *ante*, p. 671, note (s).

a prisoner, that he is one of the judges or jurors who is to try him. (c) And in the case of Hacker, two of the persons in the commission for the trial came off from the bench, and were sworn, and gave evidence, and did not go up to the bench again during his trial. (d)

(c) 2 Hawk. P. C. c. 46, s. 83.<sup>1</sup>

(d) Ibid.

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AMERICAN NOTE.

<sup>1</sup> A juror has been held to be a competent witness in America. See *Howser v. C.*, 1 P. F. Smith, 332.





## APPENDIX A.

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### *Decisions on Repealed Statutes relating to Attempts to Murder.*

**Shooting.** — It was said, that upon an indictment on the 9 Geo. 1, c. 22, it was necessary to shew that the instrument was loaded with gunpowder, and also with a bullet, slug, or other deadly substance; but that it was sufficient if such facts appeared from the general circumstances of the case. (a) Where it did not appear whether the wounds which the prosecutor had received in his neck and chin were given by the wadding, or by a ball from a pistol, except that the prisoner, who was endeavouring to effect an escape at the time, exclaimed with an oath, 'Let me pass, or I will blow your brains out,' and immediately fired, and the prosecutor said, that he apprehended the wounds must have been given by a ball from the sensation he felt at the time, and because it took him in one place; and another witness said that the report was very strong for so small a pistol; it was contended that there was not sufficient evidence that the pistol was loaded with a leaden bullet. But the Court thought that there was sufficient evidence of that fact to go to the jury: and the jury found the prisoner guilty. (b) It was necessary also, under the same Act, that the shooting should be with an instrument levelled at the party. So that where the prosecutor, who was the landlord of the premises occupied by the prisoner, had come in the night to bring provisions for a man whom he had put into possession of the prisoner's goods under a distress for rent, and had got over the pales of the garden for that purpose, but, upon being met by the prisoner and severely beaten, was making his retreat, in the dark, over another part of the pales, more than five yards' distance from the place at which he entered, when the prisoner levelled a gun at the place where the prosecutor got into the garden, and immediately fired it off; the gun being thus fired a different direction from that in which the prosecutor was going, the Court held that it was not a shooting at the prosecutor within the meaning of the statute. (c)

Shooting was within the 43 Geo. 3, though the instrument was loaded with powder and paper only, if it was fired so near the person, and in such a direction, as to be likely to kill, &c. In a case where the prisoner was indicted for shooting at the prosecutor with a loaded pistol, and Le Blanc, J., had told the jury, that if it was loaded with powder and paper only, but fired so near, and in such a direction, that it would probably kill or do other grievous bodily harm, and with intent that it

(a) 1 Hawk. P. C. c. 55. *Of Shooting*, &c., s. 9, citing *R. v. Elliott*, Old Bailey, 1787.

(b) *Weston's case*, 1 Leach, 247.

(c) *Empson's case*, 1 Leach, 224. 1 Hawk. P. C. c. 55. *Of Shooting* &c., s. 10. See *R. v. Lovell*, 2 Moo. & Rob. 39.

should do so, the case was within the Act; and the jury had convicted, saying, they were satisfied that the pistol was loaded with some other destructive material besides powder and paper; there was a petition to the Crown, on the ground that the pistol was loaded with powder and paper only: and the opinion of the judges being asked, whether, if that were so, the direction was right, they held that it was. (*d*)

If all the counts of an indictment under the 9 Geo. 4, c. 31, s. 11, for shooting at a person with intent to murder, alleged that the pistol was loaded with powder and a leaden bullet, it must have been proved that the pistol was loaded with a bullet. (*e*)

So where a similar indictment on the same statute, in different counts, alleged a gun to have been loaded with shot and various destructive materials, and it appeared that a watcher of game being out in the night, saw the prisoner crouching under a wall, and said he knew him, when he instantly raised a gun to his shoulder, and levelled it at him; he stooped to avoid it, the gun went off, and the charge, whatever it was, struck a hairy cap he had on his head, and singed the hair. There was evidence of previous ill-will, and the prisoner after his apprehension, had said, 'I did it, and I rued it the instant I pulled the trigger.' A small bag of shot was found in the prisoner's pocket after he was apprehended. It was objected that there was no evidence to shew that the gun was loaded with shot, or any of the destructive materials charged in the indictment, and Patteson, J., was strongly of opinion that the objection ought to prevail; and, after consulting Alderson, B., he directed an acquittal. (*f*)

An indictment for treason stated that the prisoner 'discharged a certain pistol loaded with gunpowder and a certain bullet' at the Queen; it appeared that the prisoner had discharged two pistols at the Queen, and two witnesses proved that at the time the pistols were discharged they heard something whizz by them; the prisoner had bought caps and balls before, and balls and bullet-moulds were found in his box; and he had said to a person, 'If your head had come in contact with the ball, you would have found there was a ball in the pistol.' Lord Denman, C. J., told the jury: 'The questions for your consideration are, whether the prisoner did fire the pistols, or either of them, at Her Majesty, and whether those pistols, or either of them, were or was loaded with ball at the time when they were so fired?' 'One witness says, "The prisoner was about five or six yards from the carriage when he discharged the pistol, and on the right side of it; the report of the pistol attracted my attention, and I had a distinct whizzing or buzzing before my eyes, between my face and the carriage." And another witness says, "It seemed something that whizzed past my ear; as I stood, it seemed like something quick passing my ear, but what I could not say." This is the only direct evidence; I have no means of furnishing you with any observation on that evidence; it is not matter of law, and you must bring your experience to bear upon it and couple it with the other facts in the case.' 'You will consider whether the prisoner discharged a loaded pistol.' A jurymen: 'Loaded with a bullet?' Lord Denman, C. J.: 'Or a ball.' Alderson, B.: 'Not with powder and wadding only.' (*g*)

The prisoner was indicted for attempting to discharge a loaded blunderbuss at J. S. The evidence was, that it had been loaded and primed a fortnight before, and that the prisoner levelled it at J. S., and drew the trigger; that the flint struck fire in the pan, but that nothing caught

(*d*) *R. v. Kitchen*, MS. Bayley, J., and *R. & R.* 95.

(*e*) *R. v. Hughes*, 5 C. & P. 126.

(*f*) *Whitley's case*, 1 Lew. 123. See *Blake v. Barnard*, 9 C. & P. 626.

(*g*) *R. v. Oxford*, 9 C. & P. 525.

fire there. The blunderbuss was afterwards discharged without any fresh priming: but the powder might in the interim have been shaken through the touch-hole from the barrel into the pan. The prisoner was convicted: but the jury found that the blunderbuss was not primed at the time. Upon a case reserved, a great majority of the judges considered this equivalent to a finding that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn; and if not, that it was not loaded within the meaning of the Act: and a pardon was recommended. (*h*) In a case prior to this decision, it appeared that the prisoner had a loaded gun; but that, in his struggle with the prosecutor, it was probable all the powder had fallen out: he afterwards levelled it at the prosecutor, and drew the trigger. Abbott, J., told the jury, that if they thought the powder was all out before the prisoner drew the trigger, the gun could not be considered as loaded at the time; and on that ground, though with reluctance, the prisoner was acquitted. (*i*)

A pistol loaded with powder and balls, but its touch-hole so plugged up that it could not possibly be fired, was not 'loaded arms,' within the 9 Geo. 4, c. 31, ss. 11 & 12. (*j*)

And there had been several similar decisions, (*k*) and these cases caused the introduction of sec. 19, by which, if the barrel be loaded, the case is within the statute, although the attempt to discharge may fail 'from want of proper priming, or from any other cause.'

A tin box, filled with gunpowder and peas, was not a loaded arm within the meaning of the 9 Geo. 4, c. 31, s. 11. (*l*)

It was a sufficient 'shooting' within the 9 Geo. 4, c. 31, to discharge the barrel of a gun, when separated from the stock, by means of striking the percussion cap with a knife. (*m*)

**Cutting and stabbing.** — The prisoner was indicted for cutting and stabbing. It appeared that he was seized for a robbery; and, in order to escape, struck the prosecutor on the head with an iron crow, which cut out part of his skull. The instrument was sharp at one end so as probably to cut. A case was reserved, because this was an instrument to force open doors, drawers, &c., and not to cut; and because the prisoner meant to break or lacerate the head, not to cut it; but the conviction was held right. (*n*)

The prisoner cut a female child, ten years old, in her private parts, probably to enlarge them to admit his entrance, but he was interrupted and fled; the wound was small, but bled a good deal; and when a surgeon saw it, four days afterwards, he found it near an inch in length, not deep nor dangerous, because below the hymen; but if it had entered the hymen it would have been dangerous. Graham, B., left it to the jury to say, whether this was not a grievous bodily injury; and if so, then, though there might have been an ulterior intention to commit a rape,

(*h*) *R. v. Carr*, MS. Bayley, J., and R. & R. 377. *R. v. Gamble*, 10 Cox, C. C. 544.

(*i*) *Anon.* 1817, MS. Bayley, J.

(*j*) *R. v. Harris*, 5 C. & P. 159.

(*k*) *R. v. James*, 1 C. & K. 530; and *R. v. Baker*, 1 C. & K. 254.

(*l*) *R. v. Mountford*, R. & M. C. C. R. 441; 7 C. & P. 242. A further question, which was not decided by the judges, was whether as the explosion was intended to have been, and must have been effected (if at all) by the agency of another, it was an attempt to discharge loaded arms at the prosecutor within the meaning of the

Act; upon this Alderson, B., said, 'The principle is laid down by Holroyd, J., in *Hott v. Wilks*, 3 B. & A. 315. If one person makes use of another, who is a mere instrument to do an act, the thing done is the act not of him who is merely the instrument, but of the person who uses him as an instrument.'

(*m*) *R. v. Coates*, 6 C. & P. 394, and MS. C. S. G., Patteson, J. His lordship consulted several other judges, who agreed with him in opinion, otherwise the case would have been reserved.

(*n*) *R. v. Hayward*, MS. Bayley, J., and R. & R. 78.

yet, if there was an intent to do grievous bodily harm, the case was within the Act; and that the intention might be inferred from the cutting. The jury found the prisoner guilty, and the judges held the conviction right. (o)

**Wounding.**—In order to obviate the difficulties which arose under the 43 Geo. 3, c. 58, upon the construction of the words ‘cut or stab,’ the 9 Geo. 4, c. 31, introduced the word ‘wound,’ which was also contained in the 1 Vict. c. 85; and as every cut or stab is included in the term ‘wound,’ the new Act has used that word only.

In order to constitute a wound, the continuity of the skin must be broken, and it is not sufficient that bones are broken, the skin not being broken. Upon an indictment for wounding, under the 9 Geo. 4, c. 31, s. 12, it appeared that the prisoners had struck the prosecutor with an iron bar and an iron hammer, and that the collar-bone had been broken, and the end of the bone much injured by violence; and upon a case reserved, all the judges, except Bayley, B., and J. A. Park, J., thought that there was no wound within the Act. (p)

A great judge has said, that the ‘definition of a wound, in criminal cases, is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, it is a wound.’ (q) Upon an indictment for cutting and wounding, with intent to murder, it appeared that the prisoner threw a hammer at the prosecutor, and hit him over his right eye and nose, and made a wound on the eye, and by the side of the nose; his head was very bloody; the hammer was a blacksmith’s finishing hammer; one end of it round, and the surface flat, the other end sharp, to draw out with. Upon a case reserved, the judges were unanimously of opinion that the injury stated in the case amounted to a wound within the statute. (r)

Upon an indictment for wounding, it appeared that the prisoner attacked the prosecutor with a butcher’s knife, and, drawing him backwards, attempted to cut his throat, and an injury (which the prosecutor described as a slight scratch) was inflicted on the throat. Parke, B.: ‘Nothing which can properly be called a wound has been inflicted in this case. A scratch is not a wound within the statute; there must, at least, be a division of the external surface of the body.’ (s)

Upon an indictment for wounding, a medical man stated that there was a slight abrasion of the skin, not exactly a wound, but an abrasion of the cuticle; it did not penetrate farther than that; the cuticle is the upper skin; blood would issue, but in a different manner, if the whole skin was cut. Coleridge, J. (Bosanquet and Coltman, J.J., being present), told the jury: ‘It is essential for you to be quite clear that a wound was inflicted. I am inclined to understand, and my learned brothers are of the same opinion, that if it is necessary to constitute a wound that the skin should be broken, it must be the whole skin; and it is not sufficient to shew a separation of the cuticle only. You will, therefore, have to say on the first three counts whether there was a wounding in the sense in which I have stated, viz., was there a wound — a separation of the whole skin?’ (t)

Upon an indictment on the 1 Vict. c. 85, for wounding, a surgeon stated, ‘That the lower jaw on the left side was broken in two places;

(o) *R. v. Cox*, MS. Bayley, J., and *R. & R.* 362.

(p) *R. v. Wood*, 1 *R. & M. C. C. R.* 278; 4 *C. & P.* 381.

(q) Lord Lyndhurst, C. B., in *Moriarty v. Brooks*, 6 *C. & P.* 684.

(r) *R. v. Withers*, 1 *R. & M. C. C. R.* 294. *S. C.* 4 *C. & P.* 446.

(s) *R. v. Beckett*, 1 *Moo. & R.* 526.

(t) *R. v. M'Loughlin*, 8 *C. & P.* 635.

the skin was broken internally, but not externally; there was not a great deal of blood; one fracture was near the chin, and the other near the ear.' The prisoner had struck the prosecutor with a hammer on the left side of the face, but there was no wound on the outside of the face. It was objected that this was not a wounding. J. A. Park, J.: 'When I first read the deposition I thought there might be some doubt. In consequence of this, I consulted with my Lord Chief Justice, and considered the question very much in my own mind, and we are of opinion that it is a wounding within the meaning of the Act.' Lord Denman, C. J.: 'If it is the immediate effect of the injury, we think we cannot distinguish this from the cases which have been already decided.' J. A. Park, J., in summing up: 'A question was very properly put to us, as to whether we thought there was a wound within the meaning of the statute. We were of opinion that there was a wound; and upon consideration, I am more strongly of that opinion than I was at the outset. There must be a wounding; but if there was a wound (that is, if the skin is broken, whether there be an effusion of blood or not), it is within the statute, whether the wound is internal or external.' (u)

On an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner had given the prosecutrix a violent kick in the private parts, and that it had been followed by an occasional discharge of blood mingled with urine, but the surgeon could not say from what precise vessels the blood originally flowed; and Patteson, J., held that the charge was not sustained; there might have been no lesion of any vessels at all; but the blood might have been discharged simply from natural causes. (v) But where on a similar indictment it appeared that a policeman had received a violent kick on his private parts, and the external skin was unbroken, but the lining membrane of the urethra was ruptured, which caused a small flow of blood, mingled with urine, for two days; Cresswell, J., held that this case was very different from the preceding, and that there was a wounding within the statute. (w)

Upon an indictment for wounding, under a repealed statute, it appeared that the prisoner struck the prosecutor with an air-gun twice on the left side of a thick hat that he had on his head; the prosecutor had a contused wound on the left side of his head, which was made by the hard rim of the prosecutor's hat, by the violence with which the hat was struck by the prisoner, and was not occasioned by the gun alone, as the prosecutor said the gun had never come directly in contact with his head: and upon a case reserved upon a doubt whether, as the wound must in fact have been caused by the hat, and not by the gun barrel, the prisoner ought to have been convicted, the conviction was held right. (x)

Upon an indictment on the 9 Geo. 4, c. 31, s. 11, for wounding, it appeared that the prisoner attacked the prosecutor with a butcher's knife; the prosecutor succeeded in warding off all hurt except a slight scratch on his throat, by lifting his two hands up to his throat, but in doing

(u) *R. v. Smith*, 8 C. & P. 173, Lord Denman, C. J., and J. A. Park, J.

(v) *R. v. Jones*, 3 Cox, C. C. 441.

(w) *R. v. Waltham*, 3 Cox, C. C. 442. See *R. v. Warman*, 1 Den. C. C. 183, where there was no external breach of the skin, but a collection of blood between the scalp and the cranium just above the spot where within the cranium there was an extravasation of blood pressing on the brain, and the surgeon called it a contused wound

with effusion of blood; the internal part of the skin was broken; medically the breaking of the skin, whether internally or externally, is a wound; and it was held that this internal wound was a sufficient wound to support the allegation of a wound in an indictment for murder, whether it would have been so or not on an indictment on the statute for wounding with intent, &c.

(x) *R. v. Sheard*, 7 C. & P. 846.

this his hands struck against the knife and were cut. Parke, B.: 'A scratch is not a wound within the statute; there must at least be a division of the external surface of the body; the cuts on the hands are indeed wounds; but it appears that they were inflicted by the prosecutor himself in the attempt to defend himself from the prisoner's attack; those cuts, therefore, cannot be considered wounds inflicted by the prisoner with intent to murder or maim the prosecutor.' (y) So where on an indictment for wounding with intent to maim, &c., the prosecutor proved that he endeavoured to persuade the prisoner to leave a public-house, and that the prisoner knocked him over a form with his fists, in one of which he appeared to have some instrument; when the prosecutor recovered his legs, he put forth his hand to ward off the attack of the prisoner, and in so doing he pushed it against the right hand of the prisoner, in which was a penknife, which ran into the prosecutor's finger just deep enough to bring blood. The prisoner seemed to hold the knife in his hand, and to use it as if he was attempting to cut the frock of the prosecutor, and the frock bore three long marks as if it had been slit downwards by cuts from the knife, and there were several scars through which the knife had not penetrated. Parke, B., held that there was an end to the charge of felony, as the prosecutor's hand came in contact with the knife at a moment when no intention existed in the mind of the prisoner to inflict any wound on his person. (z) And where on an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner knocked the prosecutor down with a stick on a tram-road; and it was contended that the wound was caused by the fall on the iron trams; Talfourd, J., told the jury, that in order to convict the prisoner the wound must be direct, and if they should be of opinion that the injury was the result of a fall, although occasioned by a blow from the prisoner, that would not be sufficient. (a)

The 9 Geo. 4, c. 31, s. 12, contained a proviso, that if it appeared that the acts of shooting, attempting to discharge loaded arms, or stabbing, cutting, or wounding, with intent to maim, &c., were committed under such circumstances, that if death had ensued, the same would not have been murder, the prisoner should be acquitted, and a similar proviso was contained in the 43 Geo. 3, c. 58. The introduction of this proviso caused many persons, who deserved very severe punishment, to escape, and in order to remedy that mischief the proviso is entirely omitted in the later Acts.

Under the repealed Act, 1 Vict. c. 85, therefore, it was no defence that the offence would not have been murder if death had ensued. (b)

(y) *R. v. Beckett*, 1 M. & Rob. 526.

(z) *R. v. Day*, 1 Cox, C. C. 207.

(a) *R. v. Spooner*, 6 Cox, C. C. 392.

(b) Anonymous, 2 Moo. C. C. R. 40. *R. v. Griffiths*, 8 C. & P. 248. It does not appear that in either of these cases any authorities on any previous statutes were referred to: but in *R. v. Nicholls*, 9 C. & P. 267, where Gurney, B., expressed a similar opinion; the cases on the Black Act, the 9 Geo. 1, c. 22, were relied upon as in point. It was held that the words of that Act, 'If any person or persons shall wilfully and maliciously shoot,' &c., made malice an essential ingredient in the offence; and, therefore, that no act of shooting amounted, under that Act to a capital offence, unless the crime would have been murder if death had ensued. Gastineaux's

case, 1 Leach, 417, where the Court said the word 'maliciously' constituted the very essence of the crime. 1 Hawk. P. C. c. 55, s. 7, where the learned author says, 'For otherwise the absurdity might follow, that the offender might be convicted of a capital crime, although the party is living, and of a single felony, viz., manslaughter, though the party were killed.' 1 East, P. C. c. 8, s. 6, p. 412. 4 Blac. Com. 207, note (2). It is worthy of observation, that the words, 'unlawfully and maliciously,' are omitted in the new clauses, where the intent is to commit murder. They are in the subsequent clauses, which provide for acts done with intents other than an intent to murder, and in which it is clear that an intent to murder cannot be necessary. C. S. G.

An indictment on the 9 Geo. 4 c, 31, s. 11, alleged that the prisoner assaulted G. T. and J. C., and with a boat-hook made holes in a boat in which they were with intent to drown them. G. T. and J. C., two little boys, were attempting to land out of a boat they had punted across the Ouse, across which there was a disputed right to ferry; the prisoner attacked the boat with his boat-hook in order to prevent them, and by means of the holes which he made in it caused it to fill with water, and then pushed it away from the shore, whereby the boys were put in peril of being drowned. If he had wished it, the boat was so near he might easily have got into the boat and thrown them into the water; instead of which he confined his attack to the boat itself, as if to prevent their landing, but apparently regardless of the consequences. Coltman, J., stopped the case, being of opinion, that an assault in fact upon the two boys ought to have been proved, seeing that the prisoner had the opportunity of attacking them personally, which he did not do, and the means by which he attacked the boat indicating an intention rather to prevent their landing than to do them any injury. (c)

**Administering poison.**—The prisoner was indicted under the 43 Geo. 3, c. 58, for administering white arsenic and sulphate of copper, with intent to murder. It appeared that the prisoner pulled a white bread cake out of his pocket, and pinched off a bit from the outside of it, and gave it to the prosecutrix to eat, and she took it and put it into her mouth, but spit it out again, and did not swallow any part of it; it was proved that the cake contained arsenic and sulphate of copper; it was objected that it ought to be proved that the poison was swallowed by, or taken into the stomach of, the person intended to be poisoned; and upon a case reserved, the judges seemed to think swallowing not essential; but they were of opinion that a mere delivery to the woman did not constitute an administering; and that upon a statute so highly penal they ought not to go beyond what was meant by the word 'administering' and a pardon was therefore recommended. (d)

If a person mix poison with coffee, and tell another that the coffee is for her, and she take it in consequence, it seems that this is an administering, and at all events, it is a causing the poison to be taken. (e)

On an indictment for attempting to administer poison it appeared that the prisoner had bought some salts of sorrel, and put it in a sugar-basin in order that the prosecutor might take it with his tea, and the prosecutor and his wife took some of it with their tea, and discovered that something was wrong, and this led to a discovery of the poison; Wightman, J., held, that if the prisoner put the poison in the sugar intending that it should be taken, that was an attempt to administer it. (f)

If A. delivered poison to B. for the purpose of his administering it to C. in A.'s absence, A. was not liable to be convicted under the 1 Vict. c. 85, s. 3, of an attempt to administer poison to C., if B. were a guilty agent. (g)

(c) Sinclair's case, 2 Lew. 49.

(d) *R. v. Cadman*, R. & M. C. R. C. 114. But in Carr. Supp. 237, where the same case is reported, it is said, that the judges held that it was no administering, unless the poison was taken into the stomach; and in *R. v. Harley*, 4 C. & P. 369, J. A. Park, J., said, that his note of this case was, 'that the judges were unanimously of opinion that the poison had not been administered, because it had not been taken into the stomach, but only into the mouth;' and this, certainly, is confirmed by the fact, that a pardon was recom-

mended, which would be correct according to this view of the decision; but incorrect, if it was sufficient to prove that the poison was taken into the mouth, as that was proved to have been done. C. S. G.

(e) *R. v. Harley*, 4 C. & P. 369. In this case the prisoner was indicted under the 9 Geo. 4, c. 31, s. 11, and see the cases, *ante*, chap. iv., as to administering drugs to procure abortion.

(f) *R. v. Dale*, 6 Cox, C. C. 14.

(g) *R. v. Williams*, 1 Den. C. C. 39. 1 C. & K. 589. The prisoners were afterwards convicted on an indictment for the

Where upon an indictment on the 14 & 15 Vict. c. 19, s. 4, for unlawfully and maliciously inflicting grievous bodily harm, it appeared that the prisoner was about to leave his situation as manager of a shop, and that he put a quantity of croton oil into the sugar-basin which was to be used by the prosecutor, his successor, who took some of the sugar and immediately became ill, and for some hours suffered dreadful pain and agony, so much so as to alarm the medical man who attended him for his life; and the prisoner had stated that he gave the croton oil to the prosecutor because he was determined to give him a good scouring, for that he had told so many stories of him. Croton oil is a very acrid poison, and highly dangerous, but occasionally administered as a medicine. It was contended that the section did not apply unless there was an assault committed, but no judgment was delivered, as the prisoner died. (*h*)

**The intent.**—Where the prisoner put into a cup of tea, which the prosecutrix was about to drink, a quantity of cantharides, and she drank the contents of the cup, and was very ill in consequence. Cantharides taken in large quantities is poisonous; but it is administered by medical men as a stimulant to the kidneys and bladder. It is also administered to procure abortion, and to excite sexual passion and desire. The jury found that the prisoner administered the cantharides to, and caused it to be taken by, the prosecutrix, with the intent to excite her sexual passion and desire, in order that he might obtain connection with her; and upon a case reserved upon the question whether the intent above stated was an intent to injure, or to aggrieve or to annoy within the 23 Vict. c. 8, the conviction was affirmed. (*i*)

A sexton and others surprised two body-stealers, and attempted to take them; one of them cut the sexton's assistant with a sabre: and was indicted on the repealed Act 43 Geo. 3, c. 58, for cutting, with the intent to murder, disable or do some other grievous bodily harm. The jury found, that he cut with the intent to resist and prevent their apprehension, and for no other purpose. Upon a case reserved, the judges held, that the case would not have been within the Act unless the apprehension would have been lawful; and that if the cutting was to resist or prevent a lawful apprehension, it should have been so stated, this being one of the intents mentioned in the Act; and that, as the jury had negatived the intent stated, the conviction could not be supported. (*j*) The prisoner had broken into a shop in the night; and, in order to prevent a watchman apprehending him there, gave the watchman two severe cuts with the sharp part of a crow-bar. The indictment was for cutting, with intent to murder, maim, and disable: and there was no count charging the prisoner with the intent of preventing his own lawful apprehension: and the jury found that he cut to disable till he could effect his own escape. Upon a case reserved, ten judges held the conviction wrong; for, by the finding of the jury, the prisoner intended to produce only a temporary disability, till he could escape, not a permanent disability. (*k*)

Where on an indictment for wounding with intent to murder, maim, disable, or do some grievous bodily harm, it appeared that the prisoner's

misdeemeanor of doing the acts with a criminal intent. See *Dears. C. C.* 547.

(*h*) *R. v. Heppingstall*, 8 Cox, C. C. 111. There was also a count at common law for administering the croton oil with intent to injure and do bodily harm, and it was urged that this was no offence at common law.

(*i*) *R. v. Wilkins*, 1 L. & C. 89. *R. v. Walkden*, 1 Cox, C. C. 282; *R. v. Hanson*, 2 C. & K. 912; and *R. v. Vaughan*, 8 Cox, C. C. 256.

(*j*) *R. v. Duffin*, MS. Bayley, J., and R. & R. 365.

(*k*) *R. v. Boyce*, MS. Bayley, J., and R. & M. C. C. 29.



goods had been distrained for rent, and one of the broker's men turned out of the room, and the broker said, 'Break the door open and go in and take possession again;' and the prisoner said, 'he would split open the head of any person who opened the door;' the door was then forced open, and as the prosecutor was entering the room, the prisoner, who had an axe in his hand, struck him on the head with it and inflicted a cut of about a quarter of an inch, and a graze of about half an inch on the forehead; the axe had cut through the skin and flesh, but very little below the surface of the skin; Parke, B., told the jury 'there was no proof of an intent to maim and disable, as the blow was aimed at the head of the prosecutor; it would have been otherwise, if it had been aimed at his arm to prevent him being able to use it. The question, therefore, was, whether there was a wounding with intent either to murder the prosecutor or to do him some grievous bodily harm.' (l)

But although the intent laid be that of doing grievous bodily harm, and upon the evidence it appears that the prisoner's main and principal intent was, to prevent his lawful apprehension, yet he may be convicted, if, in order to effect the latter intent, he also intended to do grievous bodily harm. (m)

So if a person wounded for the purpose of accomplishing a robbery, he might be convicted under the 9 Geo. 4, c. 31, s. 12, if the jury found that he intended to disable or do grievous bodily harm. (n)

On an indictment for shooting at Mr. Mahon, with a gun loaded with powder and blood, with intent to do grievous bodily harm, it appeared that Mr. Mahon was preaching in church when the gun was fired through a hole previously cut in the window: he was struck on the temple, knocked back, and stunned; his face, surplice, and Bible being sprinkled with blood; there was no wound, but grains of powder were imbedded in the forehead; the eye was weak, and the effect of the blow felt for two months after. The surgeon said that had the charge struck the eye, or a place nearer to the eye, the result would have been much more serious; Willes, J., told the jury, 'You must be satisfied that the prisoner had an intent to do grievous bodily harm: it is not necessary that such harm should have been actually done, or that it should be either permanent or dangerous; if it be such as seriously to interfere with comfort or health, it is sufficient.' (o)

On an indictment for shooting at a person with intent to maim, &c., it appeared that the prosecutor was hunting small birds, when the prisoner, a gamekeeper, came up with his gun, and ordered him off; the prosecutor ran away, but had not got more than forty or fifty yards off when he heard the report of a gun, and at the same moment felt several shots rattling against his back and arms, one of which lodged in his finger: the prisoner afterwards said, 'He had warmed their tails a goodish bit for them;' Parke, B.: 'There can be no doubt that this is an assault, but I think the felonious part of the charge cannot be supported on these facts. In order to do so, it must appear clearly that the prisoner discharged the gun at the prosecutor with the intent laid in the indictment; but he seems to have waited till the prosecutor had attained such a distance from him as not to be injured by the shot. He would rather appear to have fired after the prosecutor with a view of frightening him than with any serious intention of inflicting any injury on his person. This conduct, though very reprehensible, is not sufficient to

(l) *R. v. Sullivan*, C. & M. 209.

(m) *R. v. Gillow*, R. & M. C. C. 85. *R. v. Davis*, 1 C. & P. 306. S. P. Garrow, B.

(n) *R. v. Shadbolt*, 5 C. & P. 504. R.

*v. Bowen*, C. & M. 149.

(o) *R. v. Ashman*, 1 F. & F. 88.

bring the case within the Act, and he ought, therefore, to be acquitted of the felony.' (p)

On an indictment for feloniously wounding, it appeared that the prosecutor and his companion came up to the prisoner, who was fighting with his brother, and the prosecutor's companion said they were very quarrelsome people; whereupon the prisoner knocked him down, and said he would do the same to the prosecutor, if he would fight; the prosecutor refused, and threatened to take the law, and then the prisoner struck the prosecutor a blow with his fist, which broke the prosecutor's jaw on both sides his face; Alderson, B., told the jury that striking a blow, even though grievous bodily harm is done, is not in itself sufficient to shew an intent to do such grievous bodily harm; that must be proved by other circumstances. (q)

On an indictment for wounding with intent, and for unlawful wounding, it appeared that the police ordered some gipsies to remove from a common by the direction of the owner of a neighbouring plantation, but not the lord of the manor; they refused to do so, and one of them assaulted one of the police, who thereupon proceeded to take him into custody. The prosecutor took hold of two of the women, and while holding them the prisoner struck him on the back with a scythe, the edge of which was fenced, except two inches at the end, inflicting a wound half an inch deep, and an inch long; it was contended that the prisoner could not be convicted even of wounding; it was like the case where a person inflicted a wound with a nail on a stick, unknown to the person using it. Bramwell, B.: 'The police had no right to interfere with the gipsies, except by the order of the owner of the land, and their resistance, without the use of weapons, would have been justifiable. As to the felony charged, a man is generally supposed, by the law, to intend the natural consequence of his act; but in this case it is not so, and to find the prisoner guilty of the felony, you must be satisfied of the existence of the actual intent (to wound) charged in the indictment. As to the unlawful wounding, if this case were like that put by the counsel for the prisoner, she would not be guilty as it would be a mere accident. But it is for you to say whether, though the prisoner did not intend to wound, she did not know that the end of the scythe was uncovered, and therefore likely to wound. Suppose you fired a gun, loaded with shot, at a person, but at such a distance that you did not think it would reach him, and some of the shots did, that would be an unlawful wounding. You will say whether the prisoner is guilty of wounding with intent or of unlawful wounding, or not guilty.' (r)

Upon an indictment for maliciously wounding with intent to do grievous bodily harm, it appeared that the prisoner got into an altercation with the prosecutor, and challenged him to fight; that he put down the blade of a scythe, and advanced towards the prosecutor to fight, but was prevented; afterwards the prosecutor challenged the prisoner to fight, but they were again prevented, and the prosecutor and his party left, and some time after the prisoner and two other men followed the prosecutor and passed him. The prosecutor and his party followed, and challenged the prisoner to fight, and used provoking language. The prisoner then took his own road, and the prosecutor followed him, and again challenged him to fight, which the prisoner refused, and said he would go back, and take the peace of him, and actually went back a few

(p) *R. v. Abraham*, 1 Cox, C. C. 208. There might be a conviction of unlawfully wounding in such a case under the 14 & 15 Vict. c. 19, s. 5.

(q) *R. v. Wheeler*, 1 Cox, C. C. 106.  
(r) *R. v. Cox*, 1 F. & F. 664. This case is evidently not reported with accuracy.

steps for that purpose: but the prosecutor got before him, and was making towards him, when the prisoner flourished his scythe, and told him to stand back, or he would cut him down, and himself retreated a few steps; the prosecutor sprang on him, and seized him by the collar; a scuffle ensued, in which the prisoner struck the prosecutor across the shoulder with the scythe, and produced a severe wound. Cresswell, J.: 'The recent Act (1 Vict. c. 85), having omitted the proviso contained in the 9 Geo. 4, c. 31, the judges have determined that the facts will bring a case within this statute, if the offence would have amounted to manslaughter, in case death had ensued. If the act was done unlawfully and maliciously, that is, without lawful excuse, and intentionally, it is enough. Maliciously does not mean with premeditated malice, as in murder; an intention to do the mischief unlawfully will satisfy the statute. Now, in order to render a case of homicide, committed with a deadly weapon, lawful on the ground of self-defence, it must appear that the party retreated as far as he possibly could, and then only used the weapon to avoid his own destruction. It is impossible to contend that the prisoner was so driven to use the scythe in this case; the offence would have amounted to manslaughter if death had ensued, though certainly not an aggravated one; and therefore you will be bound to say that the prisoner is guilty, if you believe he really intended to do grievous bodily harm.' (s)

Upon an indictment for wounding with intent to do grievous bodily harm, it appeared that the prosecutor and the prisoner were fellow-servants, and the prosecutor had told the prisoner to cut some grass, which he ought to have done, but did not do, whereupon the prosecutor took a strap, and beat the prisoner with it, when the prisoner, who had lost his right arm, took out a clasp knife, and wounded the prosecutor with it. Platt, B.: 'One servant has clearly no right to strike another; and if an under-servant conducts himself in a way in which the upper-servant thinks he ought not, the latter should inform his master, and let him act as he thinks proper, either by dismissing the under-servant or otherwise. In an ordinary case, a wrongful beating with a strap would not justify the other party in resorting to a knife, but there is certainly in this case the distinction that the prisoner has lost his right arm. The assault of the prisoner by the prosecutor was clearly illegal and unjustifiable, and if, under all the circumstances, you think that the prisoner acted in self-defence only, you ought to acquit him; but if you think that in defending himself the prisoner used more violence than was necessary, you ought to find him guilty of wounding without the intent mentioned in the indictment.' (t)

**Intent to murder.** — Although upon an indictment for wounding, with intent to maim, disfigure, disable, or do some grievous bodily harm, it is now no defence that the wound was inflicted under such circumstances that, if death had ensued, it would not have amounted to the crime of murder, yet, as it is usual to insert a count charging an intent to murder, and the sentence on such a count is usually very severe, it may often become very material to decide whether the case would have been murder if death had ensued; in this view the following cases are still important. (u)

Upon an indictment on the 43 Geo. 3, c. 58, it appeared that, in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an outhouse belonging to one Spilsbury; and the wheat being soon after found concealed in an adjoining field, Spilsbury, Webb, and

(s) *R. v. Odgers*, 2 M. & Rob. 479.

(t) *R. v. Huntley*, 3 C. & K. 142.

(u) See also the cases collected in the

section on '*Resisting Officers and others*,' ante, p. 70, et seq.

others watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field, and lifted up the bag containing the wheat. They were immediately pursued; and Webb seized the prisoner, without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before Webb had spoken, the prisoner drew a knife, and cut him across the throat. Lawrence, J., held that, as Webb did not communicate to the prisoner the purpose for which he seized him, the case did not come within the statute; for if death had ensued it would only have been manslaughter. But he said, that if a proper notification had been made before the cutting, the case would have assumed a different complexion. (*v*)

But where, in a case somewhat similar, the goods had been concealed by the thief in an outhouse, and the owner, together with a special constable under the Watch and Ward Act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and another came at night and removed the goods from the place where they were deposited, and, upon an attempt to apprehend them, the prisoner fled, and was pursued by the owner of the goods, who cried out after him several times in a loud voice, 'Stop thief!' and on being overtaken, the prisoner drew a knife, with which he cut the hands of the prosecutor, and made many attempts to cut his throat, the prisoner was convicted and executed. (*w*)

So where upon a count of an indictment which charged the prisoner with maliciously wounding the prosecutor with intent to resist his apprehension for an offence for which he was liable to be apprehended, viz., for wilfully and maliciously committing damage upon certain plants and roots growing in a certain garden, it appeared that the prosecutor, a constable of the Metropolitan police force, while on duty, found the prisoner in the night-time in an enclosed garden, stooping down close to the ground, on which the prisoner ran away, and the prosecutor ran after him, and caught him getting over a hedge, and he was then in the garden; he caught him by the collar of the jacket, on which the prisoner drew a knife, and cut the prosecutor on the forehead between the eyes, and in a scuffle which ensued in several other places. The prisoner when found was plucking some carnations. The jury found that the prisoner had wilfully and maliciously plucked flowers from plants in the garden, with intent to steal the flowers, and that he was found by the prosecutor, who belonged to the police force, committing that offence, but that the prosecutor did not inform the prisoner by word of mouth that he did belong to the police force; and that the prisoner had the knife in his hand at the time with which he had been cutting the flowers; and found him guilty on the above count. Little-dale, J., reserved the question whether, considering the finding of the jury, the offence committed by the prisoner fell within the 42nd or 43rd sections of the 7 & 8 Geo. 4, c. 29, or the 22nd, 23rd, or 24th sections of the 7 & 8 Geo. 4, c. 30. Supposing the offence fell within either of these statutes, there did not appear to the learned judge much doubt as to the authority of the prosecutor to apprehend him under the 63rd section of the one Act, or the 28th of the other, as the case might be, so

(*v*) *R. v. Ricketts*, 3 Camp. 68. The prisoner was afterwards found guilty of larceny in stealing the wheat. It seems to me that this decision may well be doubted, as the facts must have told the

prisoner for what he was apprehended. C. S. G.

(*w*) *R. v. Robinson*, *cor. Wood, B., Lancaster*. 2 Stark. Ev. 693, note (*k*).

as to prove this count; and upon consideration the judges held the conviction right upon this count. (x)

Upon an indictment for shooting with intent to do grievous bodily harm, it appeared that the prisoner, being a constable, was employed to guard a copse from which wood had been stolen, and for this purpose he carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner, having no other means of bringing him to justice, fired and wounded him in the leg. It was alleged that the prosecutor was actually committing a felony, he having been before repeatedly convicted of stealing wood; but these convictions were unknown to the prisoner, and there was no reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. Erle, J., told the jury, that 'shooting with intent to do grievous bodily harm amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner that it was his duty to fire, if he could not otherwise apprehend the prosecutor; nor the alleged felony, it being unknown to him, constituted such justification.' The jury convicted; and, upon a case reserved, the judges were unanimously of opinion that the prisoner was not justified in firing at the prosecutor, because the fact that the prosecutor was committing a felony was not known to the prisoner at the time, and therefore the conviction was right. (y)

Pearce, the prosecutor, who was a gamekeeper, proved that he met the prisoner sporting upon his manor, and remonstrated with him for so doing; and proposed that the prisoner should go with him to the steward, saying, that if the steward would pardon him he should have no objection. The prisoner assented to go with him, and they walked together until they came near to the gamekeeper's horse, which was about sixty yards off, when Pearce went on before him towards the horse; and when he was at a short distance from the prisoner, the prisoner fired at his back, but said nothing. Pearce attempted to turn round, and saw the prisoner running, and attempted to run after him; but his back seemed to be broken, and he could not follow. He then turned back to the horse; and, after getting upon it, was making his way home to a place about two miles off, and had got about half a mile on the road, at a place where there was a hedge on each side, when he saw the prisoner again in the lowest part of one of the hedges; and the moment he looked round at him the prisoner again fired his gun, the discharge from which beat out one of Pearce's eyes and several of his teeth, but did not cause him to fall from his horse. Between the first and second firing was about a quarter of an hour. In the course of the trial it was suggested, that the prosecutor ought not to give evidence of two distinct felonies; but the learned judge thought it unavoidable in this case, as it seemed to him to be one continued transaction, in the prosecution of the general malicious intent of the prisoner. Upon another ground also the learned judge thought such evidence proper. The counsel for the prisoner, by his cross-examination of Pearce, had endeavoured to shew, that the gun might have gone off the first time by

(x) *R. v. Fraser*, R. & M. C. C. R. 419. It should be observed that the count was framed on the 7 & 8 Geo. 4, c. 30, s. 21, for maliciously committing damage upon the plants, but the jury found that the prisoner cut the flowers with intent to steal them, which is an offence within the 7 & 8 Geo. 4, c. 29, s. 42. It may be doubted,

therefore, whether the evidence supported the count. Another question arose on another count as to the construction of the 10 Geo. 4, c. 44, s. 7 (the Metropolitan Police Act), but upon that no opinion was given. C. S. G.

(y) *R. v. Dadson*, 2 Den. C. C. 35.

accident; and, although the learned judge was satisfied that this was not the case, he thought that the second firing was evidence to shew, that the first, which had preceded it only a quarter of an hour, was wilful; and to remove the doubt, if any existed, in the minds of the jury. The prisoner having been convicted, the matter was submitted to the consideration of the judges, who were of opinion, that the evidence was properly received, and the prisoner rightly convicted. (a)

In a case of an attempt to poison, evidence of former and also of subsequent attempts of a similar nature are admissible. (b)

It was also necessary, in proceeding upon the 43 Geo. 3, c. 58, to shew that the person apprehending acted under proper authority. For, where it appeared that the prisoner having previously cut a person on the cheek, several others, who were not present when the transaction took place, went to his house to apprehend him, without any warrant, and, upon their attempting to take him into custody, he inflicted the wound upon which the indictment was founded; Le Blanc, J., was of opinion, that the prosecution could not be sustained. He said that to constitute an offence within this branch of the statute, there must be a resistance to a person having a lawful authority to apprehend the prisoner, in order to which the party must either be present when the offence was committed, or he must be armed with a warrant; and that this branch of the statute was intended to protect officers, and others armed with authority, in the apprehension of persons guilty of robberies or other felonies. (c)

Where the intent charged in three of the counts was, an intent to prevent a lawful apprehension; and, in the fourth, an intent to do the prosecutor some grievous bodily harm; and, from the nature of the facts, the case turned upon the last count only, a point was made on behalf of the prisoner, that no grievous bodily harm was done, as the cut was upon the wrist, and did not appear to have been dangerous, as it got well in about a week; and the prisoner's counsel relied upon a doubt expressed by Bayley, J., (d) whether the injury done was a grievous bodily harm contemplated by the Act, the wound not being in a vital part. Another objection was also taken upon the facts; from which it appeared, that the prisoner having been apprehended by one Headley, in an attempt to break into his stable in the night, and taken into Headley's house, threatened Headley with vengeance, and endeavoured to carry his threats into effect with a knife which had been laid before him, in order that he might take some refreshment; and, in so doing, cut the prosecutor Cambridge, one of Headley's servants, who, with Headley, was trying to take away the knife; the act happening in that struggle, and perhaps not designedly, as against Cambridge. Upon these facts, it was objected that there was no evidence of malice against the prosecutor Cambridge, but against Headley only; and that upon the 43 Geo. 3, c. 58, general malice was not sufficient, as in the case of murder, and that malice against the particular individual was necessary. (e) A further objection was made, that the prisoner was not lawfully in custody, there being no warrant; and an attempt to commit felony being only a misdemeanor. The jury, who found the prisoner guilty, stated that the

(a) *R. v. Voke*, R. & R. 531.

(b) 2 Stark. Ev. 692. No authority is cited for this position; but see *R. v. Mogg*, 4 C. & P. 364, where, on an indictment for administering poison to horses with intent to kill them, J. A. Park, J., held other acts of administering admissible to prove the

intent, and *R. v. Geering* and other cases, vol. iii., tit. *Evidence*. C. S. G.

(c) *R. v. Dyson*, cor. *Le Blanc*, J. York Spr. Ass. 1816; 1 Starkie, N. P. R. 246.

(d) *R. v. Akenhead*, Holt, N. P. C. 470.

(e) *Curtis v. The Hundred of Godley*, 3 B. & C. 248, was cited, a case upon the Black Act.

thrust was made with intent to do grievous bodily harm to anybody upon whom it might alight, though the particular cut was not calculated to do so. Upon a case reserved, the judges were of opinion that, if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done; that general malice was sufficient under the 43 Geo. 3, c. 58, without any particular malice against the person cut; (*f*) and that, as the prisoner was detected in the night attempting to commit a felony, he might be lawfully detained without a warrant, until he could be carried before a magistrate. (*g*)

In a case upon the 43 Geo. 3, c. 58, the prosecutor and some other men had got hold of a woman, who, as they conceived, had been using another person ill, and said that she deserved to be ducked in a trough, which was near; but it did not appear that they intended to duck her. The prisoner, who was at some distance at the time, on being informed that they were using the woman ill, exclaimed, 'I have got a good knife,' rushed immediately to the place where she was, entered among the crowd, and instantly struck the prosecutor on the shoulder with the knife. The prosecutor turned round upon him; a struggle ensued between them; and in that struggle the prosecutor received other wounds. After they had fought for some time, the prisoner dropped the knife and ran away. The wound upon the prosecutor's shoulder was about seven inches long, and two deep; and the lobe of one of his ears was cut. There was likewise a slight wound on the gland of his neck, and a cut on his left arm. The counsel for the prisoner objected, that the first count of the indictment, which stated an attempt to murder, &c., and the second count, which stated an attempt to maim, disfigure, and disable, could not be supported; and that the only question was upon the third count, which stated an intent to do some grievous bodily harm. And upon this question, he submitted, that the wounds were not of that kind from which grievous bodily harm could ensue; that the transaction was a scuffle, in which a knife was used accidentally, without any settled design to 'maim, disfigure, or disable,' or to do 'other grievous bodily harm' to the prosecutor; and also that the wounds were not inflicted in a part of the body which could produce such a consequence. Bayley, J., entertained some doubts on the case: which appear to have proceeded principally on the grounds that the wounds were not in a vital part; that it was questionable whether the injury done was a grievous bodily harm contemplated by the Act; and whether, if death had ensued, the crime would have been more than manslaughter. And, taking all the circumstances of the case into consideration, he directed the jury to acquit the prisoner. (*h*)

An indictment charged the prisoner, in one set of counts, with shooting at Hill, with intent to murder Hill; and in another set with shooting at Lee, with intent to murder Lee; and it appeared that the prisoner having ill will against Lee, went to his house, and called to him to come out and be killed; and Hill, who was in the parlour with Lee, went into the hall, and the prisoner instantly fired a pistol at him, but without doing him any injury; it was objected that the prisoner must have shot at a person with intent to kill that person, and that here there was no intent to injure Hill. On the part of the Crown, *R. v. Hunt* (*i*) was cited. Littledale, J.: 'If it had not been for the case of

(*f*) As to this see *R. v. Latimer*, 17 Q. B. D. 359.

(*g*) *R. v. Hunt*, R. & M. C. C. 98. *R. v. Griffith*, 1 C. & P. 298. S. P. as to bodily

harm. *J. A. Park, J.* See *R. v. Howarth*, R. & M. C. C. R. 207.

(*h*) *R. v. Akenhead*, 1 Holt's N. P. R. 469.

(*i*) *Supra*, note (*g*).

*R. v. Hunt*, I should have felt little difficulty. The question I shall leave to the jury is, whether the prisoner intended to injure Mr. Hill. But I shall tell them, that a man must be taken to intend the consequences of his acts.' His lordship said, in summing up, 'If this had been a case of murder, and the prisoner intending to murder one person, had, by mistake, murdered another, he would be equally liable to be found guilty. The question, however, may be different on the construction of this Act of Parliament. There is no doubt that the prisoner shot at Mr. Hill, and that, if death had ensued, the offence would have amounted to murder; and then it will be for you to say, whether the prisoner intended to do Mr. Hill some grievous bodily harm. It certainly appears that he did not so intend in point of fact. However, the law infers that a party intends to do that which is the immediate and necessary effect of the act which he commits.' The Foreman of the Jury: 'We find him guilty of shooting at Mr. Hill, with intent to do Lee some grievous bodily harm.' Littledale, J.: 'There is no count for that. Do you find him guilty of shooting at Lee?' The Foreman: 'No; he fired at Hill, intending to fire at Lee.' Littledale, J.: 'Do you find that he intended to do harm to Hill?' The Foreman: 'We find that he did not intend to do any harm to Hill.' Littledale, J.: 'A verdict of not guilty must be recorded.' (j)

On an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner had recently had a quarrel with another man in a public-house, and had waited outside for the purpose of attacking him when he should come out: the prosecutor, with whom the prisoner had had no dispute, was the first to leave the house, and being mistaken by the prisoner for his former antagonist, he gave him the wound in question. It was contended that the intent was not proved, and *R. v. Holt* (k) was cited. Alderson, B.: 'If *R. v. Holt* lays down the position you contend for, I shall certainly overrule it. I do not think it is either law or good sense. I shall direct the jury, that if they think the prisoner did to the prosecutor what he intended to do to another man, they must find him guilty.' (l)

Upon an indictment for wounding W. Taylor with intent to murder him, it appeared that the prisoner intended to murder one Maloney; and, supposing Taylor to be Maloney, shot at and wounded Taylor; and the jury found that the prisoner intended to murder Maloney, not knowing that the party he shot at was Taylor, but supposing him to be Maloney, and that he intended to murder the individual he shot at, supposing him to be Maloney, and convicted the prisoner; and, upon a case reserved, it was held that the conviction was right, for, though he did not intend to kill the particular person, he meant to murder the man at whom he shot. (m) Where on an indictment for wounding with intent to do grievous bodily harm to the prosecutor, it appeared that the prisoner with a knife struck at Withy, and the prosecutor interfered and caught the blow on his arm; Crowder, J., held that this would not sustain the charge; but the prisoner might be convicted of unlawfully wounding. (n)

(j) *R. v. Holt*, 7 C. & P. 518. Littledale, J., considered the second set of counts quite out of the question. It is submitted that this was a wrong decision. The prisoner intended to injure the person he shot at.

(k) *Supra*.

(l) *R. v. Lynch*, 1 Cox, C. C. 361.

(m) *R. v. Smith*, Dears. C. C. 559. 25

L. J. M. C. 29. And see *R. v. Stopford*, 11 Cox, C. C. 643.

(n) *R. v. Hewlett*, 1 F. & F. 91. In this case there was no intent to injure the person wounded; it is therefore quite different from the cases where, though there is a mistake as to the person, the injury is intended for the person on whom it falls. But see *R. v. Jarvis*, 2 Moo. & Rob. 40. And see the next case.



Upon an indictment on the 9 Geo. 4, c. 31, s. 11, for administering poison to E. Davis, it appeared that a parcel of sugar and tea, with poison in it, directed 'to be left at Mrs. Daws, Fownhope,' was left on a shop counter, and afterwards delivered to a Mrs. Davis, who used some of the sugar, and was made very ill by it. Gurney, B.: 'The question is, whether the prisoner laid this poison on the shop counter, intending to kill some one. If it was intended for Mrs. Daws, and finds its way to Mrs. Davis, and she takes it, the crime is as much within this Act of Parliament as if it had been intended for Mrs. Davis. If a person sends poison with intent to kill one person, and another person takes that poison, it is just the same as if it had been intended for such other person.' (o)

But where an indictment on the 1 Vict. c. 85, charged the prisoner with causing poison to be taken by G. Power, with intent to murder the said G. Power; but it appeared that the prisoner's intention was to murder Catherine Power, and that G. Power had accidentally swallowed the poison, and the prisoner was found guilty. Parke, B., afterwards said he had spoken to Alderson, B., on the subject, and that they both much doubted whether the verdict could be supported, the averment of the intention not being proved as laid. He was aware that there was a case (p) where, under the old law (9 Geo. 4, c. 31, s. 11), a conviction had taken place, though there was a similar defect in the evidence, but he doubted the propriety of that decision; and, to provide for any such case, the language of the new statute, under which the prisoner was tried (1 Vict. c. 85, s. 2), had been altered; for under that section it was sufficient to allege that the prisoner did the act 'with intent to commit murder,' generally. The prosecutor had here unnecessarily described the intention more particularly than he need have done, but having so described it, it appeared to the learned Baron, that the prosecutor was bound to prove the intention as laid. His lordship therefore desired a fresh indictment to be prepared, alleging the intent to have been 'to commit murder' generally, under which the prisoner was tried and convicted, and sentenced to be transported for life. (q)

(o) *R. v. Lewis*, 6 C. & P. 161.

(p) *R. v. Lewis*, *supra*.

(q) *R. v. Ryan*, 2 M. & Rob. 213. It seems probable that the intention of the Legislature in providing, by the 43 Geo. 3, c. 58, and the 9 Geo. 4, c. 31, for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder; and the proviso in those statutes, that if the acts were committed *under such circumstances* that if death had ensued it would not have amounted to the crime of murder, the prisoner should be acquitted, tends to shew that the Legislature so intended. The tendency of the cases, however, seems to be, that an actual intent to murder the particular individual injured must have been shewn under those statutes, and also under the 1 Vict. c. 85, where the intent is so laid. Where a mistake of one person for another occurs, the cases of shooting, &c., may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that indi-

vidual at whom he shoots; it is true he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut one person under a mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In *R. v. Mister*, Salop Spr. Ass. 1841, *cor. Gurney, B.*, the only count charging an intent to murder was the first, and that alleged the intent to be to murder Mackreth; and although on the evidence it was perfectly clear that Mister mistook Mackreth for Ludlow, whom he had followed for several days before, yet he was convicted and executed, and I believe the point never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence of the prisoner; for in such case he can have no actual intent to injure that person. These difficulties, however, seem to be obviated by the 1 Vict. c. 85, which, instead of using the words 'with intent to murder such person,' has the words 'with intent to commit murder.' It may perhaps be doubted whether this alteration was not

On an indictment for shooting at a person unknown with intent to murder him, it appeared that the prisoner, being irritated at a crowd of boys, who were following him, discharged a loaded pistol among them, and thereby wounded a person who was passing along the street; there was nothing to shew any intent to shoot at any particular person, nor was the person injured one of those who were teasing him. Jervis, C. J. (Alderson, B., being present), said, 'I do not think that the charge contained in this indictment is proved; doubtless at common law, if the person wounded had been killed, it would have been murder: but this is an offence under the statute, and must be proved strictly in its very terms.' It was then proposed to amend the indictment, by charging the prisoner with an intent to murder in the words of the 1 Vict. c. 85, s. 2. Jervis, C. J.: 'That would no doubt be a good indictment after verdict under the 7 Geo. 4, c. 64, s. 20, being in the words of the statute; but it may be a question whether it would not be demurrable for generality. We think that if we amend, we ought to do it in such a manner as that the indictment shall not be in any way defective. The prisoner has pleaded, and he ought to have an opportunity of demurring, which now of course he cannot do. We must therefore refuse the application.' (r)

The prisoner was indicted for shooting at H. Lawton with intent to do him grievous bodily harm. The prisoner had been assaulted and annoyed by several persons, among whom was Lawton. These persons were standing together in a group of about fifteen, and the prisoner fired a pistol into the group, and Lawton received some severe shot wounds in the neck. The jury found that the prisoner did not aim at Lawton, or at any one in particular, but that he fired into the group, intending generally to do grievous bodily harm, and so unlawfully wounded. Upon a case reserved, it was held that he was rightly convicted of the felony. (s)

Upon an indictment for administering poison with intent to murder, it appeared that the prisoner had administered to a child nine weeks old two *cocculus indicus* berries. The child vomited one of them up, and the other passed through her body in the course of nature. Two medical

intended to enable the prosecutor to charge a shooting at one person with intent to murder another person; and doubts may perhaps be entertained, notwithstanding the very great weight due to any opinion of the very learned Barons, who considered this point in *R. v. Ryan*, whether a count, stating a shooting with intent to commit murder, would not be bad on demurrer, in arrest of judgment, and on error, for not stating the person intended to be murdered. It is true that it would follow the words of the Act; but in many cases that is not sufficient. Thus in *R. v. Martin*, 8 Ad. & E. 481, 3 N. & P. 472, it was held that an indictment for obtaining goods by false pretences was bad on error, on the ground that it did not state that the goods obtained were the property of any person. In all cases of doubt as to the intention, it would be prudent to insert one count for shooting at A. with intent to murder him; another 'with intent to commit murder'; and a third for shooting at A. with intent to murder the person really intended to be killed; and if the party intended to be killed were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown. C. S. G.

(r) *R. v. Lallement*, 6 Cox, C. C. 204. It is clear that after the amendment the jury might have been discharged under the 14 & 15 Vict. c. 100, s. 1, and the Court might then have given the prisoner leave to withdraw his plea and demur to the amended indictment. This case as to the general allegation being insufficient on demurrer, accords with my former note (7). I still venture to submit that it is extremely questionable whether the indictment would not be equally bad after verdict, and I doubt whether any case can occur where an indictment may not be so framed as to meet the facts, and avoid the necessity for such a count; for wherever it is possible to prove an intent to murder any person, it is plain a count may be framed to meet that case. C. S. G.

(s) *R. v. Fretwell*, L. & C. 443. The case of *R. v. Lallement*, 6 Cox, C. C. 204, *supra*, does not appear to have been referred to. In that case the person injured had not been irritating the prisoner, and his shooting that person might perhaps be regarded as an accidental shot. See *R. v. Jarvis*, and *R. v. Hewlett*, *supra*. *R. v. Stopford*, 11 Cox, C. C. 643.

men proved that the *cocculus indicus* berry is classed with narcotic poisons: the poison consists in the presence of an alkaloid, which is extracted from the kernel; all the noxious properties are in the kernel; it has a very hard exterior or pod, to break which much force is required. One of these witnesses added that the berry, if the pod is broken, is calculated to produce death in an adult human subject, though he did not know how many would be required for the purpose: he thought the poison contained in the kernels of two berries, if the pods were burst, and if retained on the stomach, might produce death in a child of nine weeks old, but that the berry could not be digested by the child, and that it would pass through its body without the pod being burst, and so would be innocuous. It was objected that the berries were not poison within the meaning of the statute; for that though the kernel of the berries contained poison, yet the pod rendered the poison innocuous. The objection was overruled, and, upon a case reserved, the judges were unanimously of opinion that the conviction was right. *Wilde, C. J.*: 'It is admitted that the kernel is poison, though not the pod; part of the berry is therefore admitted to be poison, though not the whole. The whole berry was administered, and with intent to kill. The act, therefore, of administering poison with intent to kill is proved. The effect of that act is beside the question: the act was an administering poison, which failed to produce the intended effect. We all think the conviction right.' (t)

'It is a very important question, whether on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder had death ensued;' (u) and this question does not seem to be completely settled. In a case where a man was indicted for inflicting an injury dangerous to life on a child, with intent to murder it, and his wife as principal in the second degree, for aiding and abetting him, where it appeared that the prisoners had inflicted great violence on the child, *Patteson, J.*, told the jury, 'Before you can find the prisoner, *T. C.*, guilty of this felony, you must be satisfied that when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient, unless he actually intended to commit murder. With respect to the wife, it is essential not only that she should have assisted her husband in the commission of the offence, but also that she should have known that it was her husband's intention to commit murder.' (v) But in another case, where the first count charged the prisoner with shooting with intent to murder, and the facts were such as only to amount to manslaughter, the same very learned judge said, in summing up, 'It is a very important question, whether, on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had

(t) *R. v. Cludero*, 1 Den. C. C. 514. In the course of the argument, *Alderson, B.*, said, 'Suppose arsenic given in a globule of glass, would that be an administering of a destructive poison?' *Williams, J.*: 'Suppose a child to have a feeble digestion by reason of tender age, and the medical man to say that it could not digest the pod for that reason, could the amount of the di-

gestive power in the particular case affect the question?' *Alderson, B.*: 'Suppose a grown man could digest it, would it be poison? if so, would it cease to be poison because a child is supposed to be incapable of doing so?'

(u) *Verba Patteson, J. R. v. Jones*, 9 C. & P. 258.

(v) *R. v. Cruse*, 8 C. & P. 541.

ensued; however, if it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance, that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. In the present case, I think you may dismiss the first count from your consideration, as it would be very difficult to say, that if Mr. V. had died, this would have been a case of murder. (w)

Upon an indictment for feloniously wounding with intent to murder, disable, &c., it appeared that the prisoner, being confined in Abingdon Gaol, pretended that he wanted some water, and, as soon as the turnkey brought him the water, the prisoner knocked him down by a blow on the head with a towel-roller, and thereby wounded him. He did this in order to effect his escape. In summing up, Maule, J., said: 'If the prisoner had killed this man it would have been murder, whether he intended to kill him or not; but I think that there is hardly evidence here to support the charge of an intent to murder. A person cannot have an intent to murder, or an intent to do any other thing, without intending to commit murder, or to do that other thing. It would be a contradiction in terms if it were otherwise. You will, therefore, consider whether the prisoner had an intent to kill this man, or only an intent to disable him, or to do him some grievous bodily harm.' (x)

So where upon an indictment for attempting to suffocate and strangle with intent to murder, it appeared that the prisoner had put a bed over his wife, and pressed it down upon her, and put a rope round her neck with a running noose on it, by which she was nearly prevented from breathing; Maule, J., told the jury, that in many cases a party might be guilty of murder if he caused the death by an illegal act, although at the time he did not actually intend to kill, and that in this case the prisoner would have been guilty of murder if his wife had died; but upon this indictment the jury must be satisfied that at the time the prisoner did the acts in question, he did intend to murder his wife. (y) And in a later case, Coleridge, J., told the jury that the words 'with intent to commit murder,' meant 'with intent to kill under such circumstances as would amount to the crime of murder, if death ensued.' (z)

Upon an indictment for wounding with intent to murder, &c., it appeared that the prosecutor had given evidence against some wood-stealers, with whom the prisoner was intimate; the prisoner struck him with a tin can four times on the head, knocked him about, and said he would break his neck; and there were two cuts on the prosecutor's scalp, which laid his skull bare. Alderson, B., in summing up, said: 'You will have to consider in this case whether, if death had ensued, the prisoner would have been guilty of murder; and in giving your judgment on that question, you will have to consider, whether the instrument employed was, in its ordinary use, likely to cause death; or, though an instrument unlikely, under ordinary circumstances, to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise. A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but, if the prisoner struck the prosecutor repeated blows on the head with it, you will say whether he did this merely to hurt the prosecutor and give him pain, as by giving him a black eye or a bloody nose, or

(w) *R. v. Jones*, 9 C. & P. 258. Patte-son, J.

(x) *R. v. Bourdon*, 2 C. & K. 366.

(y) *R. v. Caldecott*, Hereford Sum. Ass. 1843. MSS. C. S. G.

(z) *R. v. Davies*, Gloucester Spr. Ass. 1844. MSS. C. S. G.

whether he did it to do him some substantial grievous bodily harm. The former enactments on this subject were confined to cutting instruments, and perhaps wisely; but now the matter is much more vague, and cases ought therefore to be watched carefully. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent of the party is manifest; but with an instrument like the present, you must consider whether the mode in which it was used satisfactorily shews that the prisoner intended to inflict some serious or grievous bodily harm with it.' (a)

Upon an indictment for administering opium with intent to commit murder, it appeared that the prosecutrix had been left in charge of her master's house, and going out into the yard at night the prisoners threw her down, and said they would kill her if she did not swallow some stuff out of a phial which they held to her mouth, and which stuff the evidence tended to prove was a preparation of opium. She struggled, but was compelled to swallow it; they then tied her apron tight over her face, and left her lying on her back in the yard. She was afterwards found almost insensible and very ill: by proper treatment she recovered in a few days; but there was reason to conclude, that had she remained much longer undiscovered, her life would have been in very great peril. When her master returned he found the house robbed. For the prosecution it was contended, that if the main object of the prisoners was to steal from the house, and in order to effect that they committed an act in itself unlawful, they must be taken to have intended all the consequences likely to result from such act, and death was one of those consequences: it was immaterial which was the principal and which the subordinate intent. *Coltman, J.*, told the jury that 'it would undoubtedly appear probable that one intention of the prisoners was to rob the house; but they might have had that intention and also another, namely, to destroy life; and if a noxious drug is administered, which is likely to occasion death, and the party administering it is indifferent whether it occasion death or not, that party must be looked upon as contemplating the probable results of his own action.' (b)

**Shooting at large.** — Upon an indictment, under the 9 Geo. 4, c. 31, s. 12, for maliciously shooting at G. C., it appeared that the prisoner fired into a room of C.'s house where he supposed C. was; C., however, was in another part of the house, where he could not by possibility be reached by the shot: upon this *Gurney, B.*, asked whether the indictment could be supported? A man could scarcely be said to be shot at, who was not near the place where the gun was fired. *R. v. Bailey* (c) was cited for the prosecution, where on an indictment for shooting at H. T., who was wounded with grape-shot out of a gun fired at a ship in which he was, *Lord Eldon* told the jury that he was of opinion, that if they thought the guns were fired at the vessel, and those on board her generally, that the guns might be considered as shot at each individual on board her, and therefore at H. T., the person named in the indictment: *Gurney, B.*, 'That case is perfectly distinguishable from the present; cannon-shot fired into a ship more or less endangers every individual in it; every part of the ship may be penetrated by cannon-shot; but that cannot be said of shot fired from a gun into a room where it is proved no individual then was.' (d)

Where on an indictment for shooting at the prosecutor with intent to maim, &c., it appeared that the prisoner had at various times been annoyed by night by idle persons attempting to frighten him, and the

(a) *R. v. Howlett*, 7 C. & P. 274.(b) *R. v. Dilworth*, 2 M. & Rob. 531.

This case would fall within the 24 &amp; 25 Vict. c. 100, s. 22.

(c) *R. & R.* 1.(d) *R. v. Lovell*, 2 M. & Rob. 39.

prosecutor, returning home by night, passed near the prisoner's house with a lantern; the prisoner, seeing the light, thought that his nightly visitors had again appeared, reached his gun, and fired in the direction of the light, and wounded the prosecutor in the face: Patteson, J., thought that the facts would hardly bear out the charge in the indictment. (e)

**Throwing boiling water.** — The prisoner was indicted for maliciously throwing upon P. C. 'certain destructive matter (to wit) one quart of boiling water,' with intent, &c. The prisoner was the wife of P. C., and when he was asleep, she, under the influence of jealousy, boiled a quart of water in a coffee-pot, and poured it over his face and into one of his ears, and ran off boasting she had boiled him in his sleep. The injury was very grievous. The man was for a time deprived of sight, and had frequently lost for a time the hearing of one ear. The jury having convicted, upon a case reserved on the question whether boiling water was destructive matter within the 1 Vict. c. 85, s. 5, the judges held that the conviction was right. (f)

**Exposing child.** — Upon an indictment on the 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life, it appeared that the prisoner left her infant on a cold wet day lying in an open field, intending that it should die, and it was found there after some hours nearly dead from the effects of such exposure, there being congestion of the lungs and heart caused thereby, which would have been in a short time fatal if relief had not been given. At the time when the prisoner left the child she had not caused any bodily injury to it, and in a few hours after it was found it was restored by care, and then there remained no bodily injury to the lungs, heart, or otherwise; and, upon a case reserved, it was held that there was no bodily injury caused within the meaning of the clause. All that was produced was a mere functional derangement. Congestion is the mere filling the lungs and heart with more blood than there ought to be there. All the other offences created by the clause are cases of bodily injury to the structure of the body, but here the condition of the child's organs was not attended with any lesion. (g)

**Forcing person to jump from window.** — On an indictment for causing a bodily injury dangerous to life by casting the prosecutrix out of a window upon the ground, she stated that she fell out of the window accidentally; that the prisoner beat her with his fists, and was about to inflict other injuries upon her, when she went to the window to call for assistance, and fell out of it on to the ground. In opening the case, it was stated that the evidence would be conflicting, whether the prosecutrix was thrown or jumped out of the window, but that it would be immaterial, for if the prisoner, by his violence, compelled her to throw herself out, he would be guilty. Alderson, B.: 'I do not think it will be sufficient to prove that she jumped from the window to escape from his violence. You must go farther than that, and satisfy the jury that he intended at the time to make her jump out.' (h)

**Indictment.** — An indictment under the 9 Geo. 4, c. 31, s. 12, must have stated that the prisoner 'unlawfully cut,' &c., and it was not sufficient to allege that the prisoner feloniously, wilfully, and maliciously cut, &c. (i) An indictment under the 9 Geo. 4, c. 31, for administering a poisonous or

(e) *R. v. Porter*, 5 Cox, C. C. 148. The prisoner was convicted of an assault. A question was raised in *R. v. Turner*, 2 M. & Rob. 213, whether the facts shewed an intent to maim the prosecutor; but Patteson, J., expressed no opinion on it.

(f) *R. v. Crawford*, 1 Den. C. C. 100.

(g) *R. v. Gray*, D. & B. C. C. 303.

(h) *R. v. Donovan*, 4 Cox, C. C. 399.

(i) *R. v. Ryan*, 2 Moo. C. C. R. 15. S. C. 7 C. & P. 854. See *R. v. Turner*, R. & M. 239.

destructive thing, must have averred that the thing administered was poisonous or destructive. (j) An indictment under the 1 Vict. c. 85, s. 2, charged that the prisoner feloniously did assault C. H., and that he did cause unto the said C. H. a certain bodily injury dangerous to life, by striking and beating her with his hands and fists on her head and back, by kicking her on the back, by seizing and lifting her, and striking her head against a wooden beam of a ceiling, by casting, throwing and flinging her against a brick floor, with intent to murder her. It was proposed to demur to this indictment, on the ground that the nature of the bodily injury dangerous to life should have been stated with certainty. Patteson, J., thought the point well deserving of consideration, but suggested that the prisoner should plead, he reserving to him the same benefit as if he had demurred: which was done, and after argument upon a case reserved, the judges held the indictment sufficient. (k)

Where an indictment on the 1 Vict. c. 85, s. 2, alleged that the prisoner discharged a gun loaded with gunpowder and ball at S. D., and with the ball so shot forth 'feloniously did strike, penetrate, and wound' the said S. D. upon the thigh, with intent to murder him; it was objected that the indictment was bad, because it did not allege that the wound was dangerous to life; but it was held that this averment was not necessary, and that it was as obvious, from the plain intent as from the grammatical construction of the section, that to stab, cut, or wound with intent to murder, though the stabbing, cutting, or wounding were not dangerous to life, was an offence under that section. (l)

Upon an indictment under the 9 Geo. 4, c. 31, s. 12, for wounding with a stick and with the feet, it appeared that one of the prisoners struck the prosecutor with a hedge-stake, or half-rail, on the head, and knocked him off his horse, and two other persons struck him with their fists, and kicked him over the head and body, so that he became senseless. He received a cut on the mouth, and a severe contused wound on the crown of the head. The medical witnesses were of opinion that the wound, from its position, could not have been caused by a fall from horseback, and that it was occasioned either by a blow from a stick, or a kick of a heavy shoe, when the prosecutor was on the ground. The jury found the prisoners guilty, but said they could not tell whether the wound was caused by a blow of the stick, or a kick with the shoe. It was objected that a wound given by the foot, with a shoe on it, was not within the Act; and, if it was, the mode of wounding was not properly described in the indictment, which stated it to have been done with the feet only. But upon a case reserved, the judges unanimously held that the means by which the wound was inflicted need

(j) *R. v. Powles*, 4 C. & P. 571. The case was decided on the 9 Geo. 4, c. 31, the words 'any poison or other destructive thing,' in that Act are also in the 24 & 25 Vict. c. 100, ss. 11, 14.

(k) *R. v. Cruse*, 2 Moo. C. C. R. 53. S. C. 8 C. & P. 541. It was necessary to take the objection by demurrer, or to get the point reserved as if it had been taken on demurrer, for after verdict the objection would not have availed, as the 7 Geo. 4, c. 64, s. 21, makes an indictment good after verdict, 'if it describe the offence in the words of the statute.' See as to this, *R. v. Martin*, 8 A. & E. 481. 3 N. & P. 472. The means of inflicting the injury are stated in this indictment, but it should seem that it was not necessary to

state them. See *R. v. Briggs*, *infra*, note (m). C. S. G.

(l) *Shea v. R.*, 3 Cox, C. C. 141. The Court said that the same point had been held in *Fogarty v. R.*, 2 Cox, C. C. 105; but the report does not mention any such point. There a count stated that the prisoner wilfully, maliciously, unlawfully, and feloniously, by certain means therein set out, caused to M. D. a certain bodily injury, dangerous to life, 'to wit, by then and there shooting, &c. [setting out the means] at the person of the said M. D.,' and it was objected that the acts alleged as the means whereby the wound was inflicted were not averred to have been done feloniously; but the Court overruled the objection.

not have been stated; that it was mere surplusage to state them: and that the statement did not confine the Crown to the means stated, but might be rejected as surplusage, and that whether the wound was from a blow with a stick, or a kick from a shoe, the indictment was equally supported. (*m*)

Where an indictment simply alleged that the prisoner attempted to discharge a loaded gun, and it was objected that it was bad for not describing the materials with which it was loaded; Platt, B., held that it was sufficient. (*n*) And where an indictment alleged that the prisoner 'by feloniously drawing the trigger of a certain pistol loaded with gunpowder and a leaden bullet, then and there feloniously did attempt to discharge the said pistol' at J. H., with intent to murder him; it was objected that the words, 'the said pistol' did not incorporate the previous description: Rolfe, B., 'The indictment is sufficient. It avers that the prisoner, by pulling the trigger of the pistol, attempted to discharge the said pistol, and surely that must mean that he attempted to discharge its contents.' (*o*)

An indictment for maliciously shooting might, in one set of counts, lay the shooting at one person, with intent to murder that person, and in another set of counts, the shooting at another person, with intent to murder such other person. (*p*) And where such counts were so joined, the prosecutor would not be compelled to elect on which he would proceed. (*q*) An indictment under the 1 Vict. c. 85, for maliciously cutting and wounding, might contain counts framed on sec. 2, with intent to murder, and also counts framed on sec. 4, with intent to maim, disable, and do grievous bodily harm. (*r*)

Where some counts charged the defendant with an assault on S. G., and with having thereby unlawfully and maliciously inflicted grievous bodily harm upon him, and another count was for a common assault, it appeared that the defendant handed the prosecutor a letter, and asked him to read it, which he declined to do; the defendant then struck the prosecutor with his fists two violent blows on the mouth, another on the temple, and a fourth on the back of the ear; three of his front teeth, and other teeth farther up were loosened; his gums were lacerated, and the mouth was swollen. The pain which was suffered immediately afterwards was insufferable; one of the front teeth and the back teeth had since partially fastened, but the two front teeth had not, and the prosecutor must lose them. The prosecutor had suffered much otherwise for a long time. The jury were told that the injuries inflicted fell within the definition of 'grievous bodily harm,' and that if they believed the witnesses, there was evidence to support the first counts; and that the question of whether the defendant intended to inflict grievous bodily harm did not arise, but that the simple point for their consideration was, 'did the defendant unlawfully assault the prosecutor, and thereby inflict upon him grievous bodily harm?' The verdict was, 'We find the defendant guilty of an aggravated assault, but without premeditation; it was done under the influence of passion.' It was then contended that this was a verdict of guilty upon the count for the common assault only; but a verdict of guilty was directed to be entered on the other counts, and, upon a case reserved, it was urged that the jury might

(*m*) *R. v. Briggs*, R. & M. C. C. R. 318. In *Erle's case*, 2 Lew. 133, Coleridge, J., also decided that an indictment upon the 1 Vict. c. 85, need not state the instrument used, and see *Holloway v. R.*, 17 Q. B. 317.

(*n*) *R. v. Cox*, 3 Cox, C. C. 58.

(*o*) *R. v. Baker*, 1 C. & K. 255.

(*p*) *R. v. Holt*, 7 C. & P. 518.

(*q*) *Butter's case*, 1 Lew. 86, Parke, J.

(*r*) *R. v. Strange*, 8 C. & P. 172. Lord Denman, C. J., and J. A. Park, J. See *R. v. Murphy*, 1 Cox, C. C. 108.



have intended not to find the prisoner guilty of intending bodily harm, and that intention was a necessary ingredient in the offence, and the word 'maliciously' meant something more than 'intentionally;' but it was held that the direction was correct. The language used by the jury must be construed by looking at the subject-matter of the charge, and what was left to the jury; and this assault was intentional in the eye of the law, though committed without premeditation and under the influence of passion. (s)

Upon an indictment against three for maliciously wounding with intent to do grievous bodily harm, the jury may convict two of the felony charged, and the third (under the 14 & 15 Vict. c. 19, s. 5), of unlawfully wounding. (t)

Where one count charged the defendant with maliciously inflicting grievous bodily harm; and another with assaulting, beating, wounding, and ill-treating, and thereby occasioning actual bodily harm; and the jury found the defendant guilty of a common assault; it was held that this conviction was good upon the second count. (u) And so where one count was for inflicting grievous bodily harm, another for unlawfully wounding, and the third for an assault occasioning actual bodily harm, and the jury returned a verdict of guilty of a common assault, it was held that the verdict was perfectly legal, and that the Court was bound to receive it. (v)

An indictment contained a count for unlawfully wounding, and another count for unlawfully inflicting grievous bodily harm. The jury returned a verdict of guilty of an assault:—Held, a lawful verdict which the judge was bound to receive, and a conviction upon the above indictment was affirmed, although the word 'assault' was not contained in the indictment. (w)

(s) *R. v. Sparrow*, Bell C. C. 298.

(t) *R. v. Cunningham*, Bell C. C. 72.

(u) *R. v. Oliver*, Bell C. C. 287.

(v) *R. v. Yeadon*, 1 L. & C. 81. And

see *R. v. Guthrie*, L. R. 1 C. C. R. 241.

(w) *R. v. Taylor*, L. R. 1 C. C. R. 194;  
38 L. J. M. C. 106.

## APPENDIX B.

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### *Decisions on Repealed Statutes relating to Threats and Threatening Letters.*

**What amounts to a threat.** — The construction of the 9 Geo. 1, c. 22, was much considered, in a case where the prisoner, Michael Robinson, was indicted for sending the following letter, dated, &c., without any name subscribed thereto, to one J. O. Oldham, demanding of him a certain valuable thing, namely, a bank note, against the form of the statute: —

‘SIR,

‘I am well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking: an understanding on such a matter as this is the easiest thing imaginable, and in repeating that you will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage as of wantonly sporting with the feelings of any one; I have ever despised and execrated the cowardly assassin, who, skulking in obscurity, sends forth his malignant shafts to wound the peace and the character of individuals; and I have, therefore, uniformly resisted every overture that has been made me for such a purpose. My situation as a literary character has teemed with temptations, but a sacred principle of honour has superseded them all. The subject on which I have addressed you has long lain dormant, and it was because I thought the attack of a most serious complexion that I hesitated for such a length of time in giving any countenance to it; not that I ever sought for any circumstance to influence my judgment or qualify my opinion, and, for all that has ever come to my knowledge, it may be all *the moon-shine of the moment*: I am, therefore, so far candid, and I trust, not indelicate; and it will at least be a satisfaction to you to be told, with a solemnity becoming the character I have professed myself, that not a soul but myself is in possession of a line of the MS., nor has it ever been out of my hands, or perused or heard by any person living since first I had it; so that when it is committed to the flames *all* will necessarily die with it. Of this you shall have a testimony so clear and unequivocal that it will not be possible for you afterwards to doubt. Thus much I have suggested for your satisfaction; you will now give me leave to say something on behalf of *the cause* I have engaged in. I have not the least objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must first beg leave to adjust. Perhaps I may be more anxious to urge them, in order to have some proof of your sincerity, after which I am at your service. In order to relieve a destitute and unhappy family, struggling with sickness and sorrow, you will permit me to be your almoner. Will you enable me to dispose of a little of your money, as I shall see occasion? It is a duty I owe to the cause of humanity to urge it. Remember, sir, I am

now only making my appeal to your *benevolence*. I am holding out no delusions to exact the involuntary tribute. I am asking you as a gentleman, as a man, to give me some earnest of your intention to prove what I am so strongly inclined to give you credit for. Enclose a bank note in a letter addressed to R. R., and let it be left at the Cambridge coffee-house, the top of Newman-street, in Goodge-street, on the side of the bar. At the entrance of the coffee-room is a bracket for letters; let it be placed there between the hours of eleven and one on Thursday next; and at five o'clock on the same day a line shall be sent by a porter to your house to acknowledge the receipt; after which, if you will name any day (Friday excepted) in the following week on which it will suit you, in the evening, to take a bottle of wine at the King's-head tavern, in Middle-row, Holborn, or elsewhere, I will with pleasure attend you. Our meeting, however, is to be private and *tête-à-tête*. Thus, possibly, over the ashes of the MS. a phoenix may arise that may prove the forerunner to friendship. I shall send to the coffee-house between the hours of one and four, and I will venture to say that you will have no reason to be dissatisfied with the event of this correspondence. To obtain confidence it is necessary, or at least reasonable, to expect that one should be reposed. 'I have the honour to remain, Sir,

'Your obedient humble servant,

'Tuesday, 12th January, 1796.

'R. R.

'J. O. OLDHAM, Esq.,

'Brook-street,

'(Private.) Holborn.'

The prosecutor had served an apprenticeship with a person named Dolly, by whom he was afterwards taken into partnership; upon Dolly's death a report was spread that the prosecutor had been the author of his death, upon which he brought an action against two persons, and had judgment against them. Before the letter in question was sent, several other letters had been written by the prisoner to the prosecutor, to which he returned answers, for the purpose of obtaining information of the prisoner's place of abode, in order to bring him to justice. And all these letters were read in evidence, as serving to explain the letter upon which the prisoner was indicted. It was intimated in them that another person, who was a friend of the prisoner's, and who was in distress, had put certain MSS. into his hands, containing a charge of the prosecutor having murdered his former master, Dolly, and afterwards married the widow, his accomplice; but that the prisoner was unwilling to publish the MSS. containing so serious a charge without giving a previous intimation to the prosecutor, and hearing what he had to propose upon the subject. A subsequent correspondence between the prosecutor and the prisoner was also given in evidence; in the course of which the prisoner communicated a few pages of the supposed MSS. in verse, from which the charge alluded to was to be plainly inferred. Upon this evidence the learned judge before whom the prisoner was tried left the case to the jury to say whether the prisoner sent the letter above set forth, and whether it contained a threat to publish a libel on the prosecutor, imputing to him the death of Dolly, unless he would send the prisoner a bank note; and in case they were of that opinion they were directed to find the prisoner guilty. The jury found him guilty, and also found specially that the prisoner sent the letter in the indictment, and that it contained a threat to publish a libel, imputing to the prosecutor the murder of his master, in order to extort money from him. Several objections were taken to this conviction, and amongst others it was objected

that the letter did not contain *a threat or demand*, so as to bring the case within the 9 Geo. 1, c. 22. But the judges, after hearing the point argued, all agreed in overruling the objection. Buller, J., in delivering their opinion, after adverting to the preamble of the statute (upon which the counsel for the prisoner had founded his argument, by contending that it necessarily so far restrained the enacting clause that the demand contained in a letter must be subscribed and peremptorily accompanied with a threat of bodily harm), said: — ‘Where the enacting clause of a statute refers to such offences only as are contained in the preamble, it may be restrained by the preamble; but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions of the statute, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief, as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the legislature thought within the mischief. If the enacting clause in this case were to be restrained by the preamble, the statute would apply only to cases where several persons had joined together in confederacy; where the letter was signed with a fictitious name only, and where venison or money was demanded; and not to a letter without a name, nor to a demand of any other valuable thing than money or venison, nor to any demands by such letters, whether accompanied with a threat of bodily harm or not. But the enacting clause expressly applies to a single offender; to a letter sent without a name, as well as to one signed with a fictitious name; and to a demand of any valuable thing as well as of money or venison; and also to all demands by such letters, whether accompanied with a threat of bodily harm or not. I agree that a mere request, such as asking charity without imposing any conditions, would not come within the sense or meaning of the word “*demand*,” but here the demand was made under a threat that if it was not complied with the prisoner would publish a libel against the prosecutor, imputing to him the death of his master: for this is the construction which the jury by their verdict have expressly put upon the letter. Now, whether the letter does amount to such a demand or not is a question for the judges to determine, upon reading it, as it is stated in the record; and they are all clearly of opinion that this is *a demand* within the true intent and meaning of this statute. It is a demand of money or money’s worth (which a bank note is), by holding out a threat to impute murder to the prosecutor, and to injure his fame and his character; and not a request of voluntary charity.’ (a)

In the following case, upon the 27 Geo. 2, c. 15, it was holden that the construction of the letter, namely, the question whether it contained, in the terms of it, an actual threatening to kill or murder, was properly left to the jury. The first count charged the prisoner generally with feloniously sending to the prosecutor a certain letter in writing, with the fictitious letters J. W. thereunto subscribed, threatening to kill and murder the prosecutor. In the second count the letter was set out in the following form: —

‘SIR,

‘February 9, 1776.

‘I am sorry to find a gentleman like you would be guilty of taking *MacAllester’s* life away for the sake of two or three guineas; but it will not be forgot by one who is just come home to revenge his cause. This you may depend upon, whenever I meet you, I will lay my life for him in this cause. I follow the road, though I have been out of London; but

(a) Robinson’s case, 2 Leach, 479. 2 East, P. C. c. 23, s. 2, p. 1110.

on receiving a letter from *MacAllester* before he died, for to seek revenge, I am come to town. I remain a true friend to *MacAllester*.

‘J. W.’

Hotham, B., left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder, directing them to acquit the prisoner if they thought that the words might import anything less than to kill or murder. The jury found the prisoner guilty, and upon a case reserved on the point (amongst others), viz., whether the letter purported to be a letter threatening to kill or murder, ten judges, who were present, were all clearly of opinion that the conviction was right, and that the construction of the letter was properly left to the jury. (b)

It was holden, however, in a subsequent case, that as the letter in question did not, by necessary construction, import a threat to burn the prosecutor’s farm-house and buildings, a conviction upon the 27 Geo. 2, c. 15, was wrong. The letter was as follows:—

‘MR. WOODGATE, — Sir,

‘March 3rd, 1798.

‘I am very sorry to acquaint you that we are determined to set your mill on fire, and likewise to do all the public injury that we are able to do you, in all your *farms and seteres*, (c) which you are in possession of, without you on next (d) day release that Ann Wood which you put in confinement. Sir, we mention in a few lines that we hope if you have any regard for your wife and family you will take our meaning without anything further; and if you do not we will persist as far as we possibly can, so you may lay your hand at your heart, and strive your uttermost ruin. I shall not mention nothing more to you until such time as you find the few lines a fact, with our respect. So no more at this time from me,

‘R. R.’

Upon the trial, Mr. Woodgate, the prosecutor, swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; but that he held a farm when the letter was written and came to his hands, and still held it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the Act of Parliament; and the prisoner having been convicted, the point was submitted to the consideration of the judges, who agreed (except Eyre, C. J., who was absent) that as the prosecutor had no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest of the letter, Lord Kenyon, C. J., and Buller, J., were of opinion that it must be understood as also importing a threat to burn the prosecutor’s farm-house and buildings; but the other judges not thinking that a necessary construction, the conviction was holden wrong. (e)

It has since been held that upon the trial of an indictment for sending a letter to the prosecutor, threatening to burn his house, &c., it may be left to the jury to say whether the letter amounted to such a threat. The indictment charged that the prisoners feloniously did send to

(b) Girdwood’s case, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. The prisoner was executed.

(c) It is said that by this was understood ‘settings or lettings,’ and that the whole letter was evidently the production of an illiterate person, being falsely spelt

nearly throughout. 2 East, P. C. c. 23, s. 2, p. 1115, note (a).

(d) In 2 East, *ibid.*, the learned writer says, that the word at this part was unintelligible in his copy.

(e) R. v. Jepson, 2 East, P. C. c. 23, s. 2, p. 1115.

J. Belcher, a writing, without name or signature, directed to the said J. Belcher, by the name and description of 'Starve-gut Belcher,' threatening to kill and murder him, which said writing is as follows, viz.:— 'Starve-gut Belcher, if you don't go on better great will be the consequence; what do you think you must alter an (or) must be set fire; this came from London: i say your nose is as long rod gffg sharp as a flint, 1835. You ought to pay your men.' A second count sent out the letter as threatening to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., asked the jury in the terms of the statute, whether this was a letter threatening to put J. Belcher to death, or to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay and straw? The jury negatived the threat to put him to death, but found that the letter threatened to fire his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., had some doubts whether this question ought to have been left to the jury, and whether the letter could be in point of law a threatening letter, to the effect found, but, upon a case reserved, the judges held the conviction good after verdict. (f)

A letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him, did not threaten to charge such an infamous crime as to be within the 4 Geo. 4, c. 54, s. 3. (g)

A letter intimating that some persons had conspired to burn or otherwise destroy the property of the prosecutor, and offering to make a disclosure if a certain sum of money was placed in a certain spot for the writer, was held not within the 7 & 8 Geo. 4, c. 29, s. 8; though it may create apprehension in the owner's mind, it does not contain a menace. (h) The prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 8, for sending the following letter to Mr. Young, demanding money with menaces:—

'SIR,

'As you are a gentleman and highly respected by all who know you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed among themselves to take from you personally a sum of money, or injure your property. I have overheard all the affair. I mean to say, your building property, in the manner they have planned this dreadful undertaking, would be a most serious loss. They have agreed to commence this upon an appointed time in the course of this winter, which would be a most dreadful sight. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. Tatler's garden gate, I will leave a letter in the place, to inform you of the night this is to take place. I can also inform you how you could be sure to secure the offenders; but you must keep this all quite secret, and not make a talk of it, as it would come to their ears, and then they would put it off to another time. Sir, I hope you will not attempt to seize upon me, when I come to take up the money and lay down the note of information. Sir, you will find I am doing you a most serious favour. You will please excuse me in not describing my name, but I will make myself known the day after you have taken them, and be a witness

(f) R. v. Tyler, R. & M. C. C. R. 428.

(g) R. v. Hickman, R. & M. C. C. R. 34. The word 'solicitation' was introduced in the 6 Geo. 4, c. 19, the 7 & 8 Geo. 4, c. 29, s. 9, and the 1 Vict. c. 87, s. 4, to meet this case. Another point, on

which the judges were equally divided, was whether the letter supported a count for sending a letter demanding money from the prosecutor.

(h) MS. Bailey, J. 3 Burn, J. D. & Wms. 506.

against them. I shall come to lay down my letter on the 1st of December if I find the money. Sir, I am your unknown friend.'

It appeared that the prisoner had written the letter, and had done so with an intention of getting the thirty sovereigns to leave the country. For the prosecution it was contended that the letter contained a sufficient demand of money, as the request was accompanied by a condition, namely, to discover persons going to do a certain act; and *Robinson's case* (i) was cited. And, with respect to the menaces, to hold that the letter contained none, would be equivalent to holding that, whenever the menaces came from one person, and the letter from another, neither could be indicted; and, at all events, it was a question for the jury whether the letter did contain menaces. *Girdwood's case*, (j) Bolland, B., thought that he ought to decide whether the letter contained menaces or not; but he consulted Littledale, J., who thought the question should be left to the jury; and Bolland, B., then left it to the jury to say, whether the letter contained menaces: and they convicted the prisoner; but, upon a case reserved, the judges were of opinion that the conviction was wrong. (k)

The prisoner was convicted of having feloniously sent a letter to Sir W. R. Farquhar, Baronet, and others, demanding money with menaces, and without any reasonable or probable cause, of which letter the following is a copy:—

'GENTLEMEN,

'You say B. O. N. will accede to the terms proposed, and send part of the means to any place which may be named. You would have had an answer yesterday, but was prevented. If you act honourably by me, and not by any means deceive me, or allow any spy to watch me *I will save you or perish in the attempt, though I hazard my life in so doing*, and must have sufficient means at my disposal without delay, or all will be lost. I am fully assured that £20,000 *would not cover the horrid catastrophe, which would not only stop your bank for a time, but perhaps for ever, as the books would be all destroyed. The match, the most dreadful and last resource, has been contemplated by the cracksmen or captain of this most horrid gang*, which I fervently pray to be relieved from. (I have never yet, so help me, God, done a deed I am afraid or ashamed of) and the only way I can privately obtain means will be the following:—At the London end of Kensington gardens (on the Knightsbridge side) there is a dike sloped, which divides the gardens from the park and a carriage road, where the roads meet as you turn to ride or drive across the bridge. It is a short distance from the first lodge, where the keeper remains in the gardens. By looking up that dike you will see large iron pipes, which convey water, &c., to the pond. A large elm tree stands in the middle of this road, betwixt the park and the gardens. There is sufficient room under the first pipe to conceal a small bag. If you will, therefore, send a man you can confide in, and lodge beneath the pipe 250 sovereigns unseen by any mortal eye, I swear most solemnly by Almighty God to prevent the evil, if, when I have completed my task, and inform you all is safe, or denounce the villains, you will let me have £250 more, which, if God prospers me, I will repay with gratitude, as I could not get into business for less than £500, to

(i) *Ante*, p. 702.

(j) *Ante*, p. 703.

(k) *R. v. Pickford*, MSS. C. S. G. and 4 C. & P. 227. S. C. 3 Burn, J. D. & Wms. 506. Tindal, C. J., Garrow, B.,

J. A. Park and Bosanquet, JJ., thought this a letter demanding money with menaces. The other eight judges inclined to a contrary opinion. MS. Bayley, J.

obtain a respectable living. Let the money be lodged to-morrow Saturday morning, by half-past eleven, but not a moment sooner, and all shall be well with you; but if I am at all deceived in any possible way all must fall on yourselves.' (l) It was objected that this was not a threatening letter within the statute; but the objection was overruled: and, on a case reserved upon that question, it was contended that the letter contained no menace from the party writing it, and that the case was not distinguishable from *Pickford's case*. (m) Wilde, C. J., "Let the money be lodged to-morrow morning, by half-past eleven, but not a moment sooner, and all shall be well with you; but if I am at all deceived in any possible way, all must fall on yourselves." Is that not a threat? That is not found in terms at all events in *Pickford's case*: so we need not overrule that decision to support this conviction.' 'We are all agreed that this letter contained such a demand as is contemplated by the statute. There is an application made for money to be given to the applicant, accompanied by a threat of ill consequences if that money is not so given. The writer professes to be cognisant of all the circumstances connected with the evil foretold, and capable of averting them; and seeks to make the prosecutor part with his money against his will in order to induce the writer to avert the evil. It is said that this is not such a threat as the law will take notice of; and that it does not come within the rule adverted to by Lord Ellenborough in *R. v. Southerton*, (n) viz., that it must be a threat attended with duress, or such a threat as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. That rule must be understood to refer rather to the nature of the threat than to the probable consequences in any particular case. Whether a threat be criminal or no cannot be taken to depend on the nerves of the individual threatened, but [must depend] on the general nature of the evil with which he is threatened. Threats attended with duress, or threats of duress, or of other personal violence, or of great injury, such as is imported by this letter, will come within the rule.' (o)

A count alleged that the prisoner sent to A. G. B. Coutts and others, her partners, a certain letter directed to the said A. G. B. Coutts, and others, by the name and description of 'J. Coutts, Esq., Banker, Strand,' demanding money from them with menaces; another count stated the letter to be sent to A. G. B. Coutts. The letter contained the following passages:—

'SIR,

'The most desperate gang in the metropolis have resolved to obtain possession, by whatever means, of a certain portion of your property: it is composed of starving men, and no efforts will be spared in effecting their firm resolves.' . . . 'Learning their design upon you, and having further a strong consideration for you, I made every effort to dissuade them, at the risk of personal suspicion and consequent danger, to abolish their intentions as respects yourself: further than this I dared not go; but intense suffering closes the ear of mercy. To remove that suffering is the only way to give access into its natural dictates; they, however, mutually agree that if I will give them a hundred pounds

(l) The question whether this was a threatening letter within the 7 & 8 Geo. 4, c. 29, s. 8, was treated as a question of law by the judge at the trial, and this was objected to on the case reserved; but the Court thought the point ought to have been raised on the trial.

(m) *Supra*, note (l).

(n) 6 East, 126.

(o) *R. v. Smith*, 1 Den. C. C. 510. Wilde, C. J., added, 'This decision does not interfere with that of *R. v. Pickford*.'



in solid gold, they will relinquish their design upon you; nothing less will satisfy. I communicate to you their demand; and personal safety will, I hope, induce compliance.' . . . 'If they receive the sum in question, I am firmly convinced you will never have any cause of fear from them; but if not, non-compliance will hereafter be repented of too late.' . . . 'That on Friday night next, at half-past nine o'clock, you will cause a little boy to be stationed at the base of the monument, who shall have in his possession the sum of one hundred pounds in solid gold, encased in boards, so that he shall not be aware of the contents, and deliver the same to the individual who asks for a parcel.' It was objected that as the letter was directed to J. Coutts, there was no proof of its being intended for any of the partners mentioned in the indictment; and that the letter was not a threatening letter within the statute. Maule, J. (to the jury): 'In the first place, the prosecutor must make out to your satisfaction that this is a letter addressed to A. G. B. Coutts and others, individually or collectively, by the name of J. Coutts, Esq., Banker, Strand. The question is, is it in substance directed to them? I do not think it necessary that the direction should contain the actual name of the partners in the firm; because nothing could then be more easy than to send a threatening letter with perfect impunity. Such a direction might be used as would ensure the paper reaching the parties for whom it was intended, whilst at the same time such a variation might be adopted as would ensure to the writer an acquittal, on the ground of such a variance as is here urged. Evidence has been given that the firm was once T. Coutts & Co., and that none but themselves carry on such a business in the Strand or in London, by such a style now. It is for you then to say whether the parties stated in the indictment are not those for whom the letter was intended. Secondly, is this a letter demanding money with menaces without any reasonable and probable cause? To ascertain this you must, of course, look to the letter itself, and to the situation of the parties. It may be that, under certain circumstances, an apparently innocent letter may convey a threat. It may be that no letter could be written which it might not be possible to prove by extraneous matter did not contain a threat. Now I can conceive a case where such a letter as this might be written:—"Sir, I trust you are well, and I shall be happy to meet you to-morrow." There I should consider myself called upon to withdraw such a letter from the jury, because it would be absurd to say such a letter contained a threat. But as it is impossible I can tell you that this letter may not contain a threat, I cannot decide that it is not a question for the jury.' 'In *R. v. Pickford* (*p*) the jury were told that the letter was not a threatening one. They found, therefore, nothing more than that it had been sent by the prisoner, and the Court held that they ought to have decided the whole question. This principle is further illustrated by *R. v. Tyler*, (*q*) where a different course was, in the first instance, pursued. The jury were not there told that the letter did or did not contain threats, but its interpretation was left to them. They came to a certain conclusion, and it was upheld by the Court. These two cases, then, shew what is the proper course in trials of this kind. Evidence is to be given of the letter sent, and it is for the jury to say whether or not it contains a sufficient threat. At any rate, if that is not the proper mode of proceeding, and the Court are competent to decide that this letter cannot, on any construction, be held to contain menaces,

(*p*) *Ante*, p. 705. This decision is erroneously stated in this report.

(*q*) *Ante*, p. 704.

the objection will be on the face of the record, and will be open to the prisoner in arrest of judgment, or by a writ of error.' (r)

An indictment on the 4 Geo. 4, c. 54, for sending a letter threatening to kill and murder R. Collier, set out the letter as follows:—

'SIR,

'You are a rogue, thief, and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. Have a care, old chap, or you shall disgorge some of your ill-gotten gains, watches and cash, that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. I am your

'CUT-THROAT.

'March 15th, 1831.'

It was objected that there was nothing in the letter which imported a threat to kill and murder Mr. C.; it was all hypothetical, and the signature 'Cut-throat' could not be called in aid, for by the statute the threat must be in the letter and not in the signature. And as the words were of ambiguous meaning there ought to have been an innuendo to explain them. But Patteson, J., held that the letter very plainly conveyed a threat to kill and murder, as no one who received it could have any doubt as to what the writer meant to threaten. (s)

The prisoner was indicted under the 4 Geo. 4, c. 54, s. 5, for having feloniously and maliciously, with intent to extort money, charged and accused A. B. with having committed the horrible and detestable crime, &c., and that he feloniously and maliciously did menace and threaten to prosecute the said A. B. The evidence was, that he had threatened to procure witnesses to support a charge already made. It was objected for the prisoner that the statute applied only to the threatening to accuse prospectively, and that this was at most a threat to support such a charge by evidence. Bayley, J., 'Threatening to procure witnesses to support a charge already made is not within the Act of Parliament, which makes it felony to extort money by threatening to accuse of an indictable offence. It is one thing to accuse, but another to procure witnesses in support of an accusation already made.' (t)

The two first counts of the indictment charged the prisoner with feloniously sending a letter to one G. Ley, threatening to burn and destroy a certain house belonging to and the property of the said G. Ley. The third and fourth counts described the house as a certain house in the possession of one T. Elliott, and then belonging to and being the property of the said G. Ley. It appeared that the house was the property of G. Ley, and inhabited by T. Elliott as his tenant, and that the letter was received by G. Ley. It was objected that the two first counts were not proved, as the term 'his' in the 4 Geo. 4, c. 54, s. 3, must have a possessory meaning, and according to the analogy of the rule of law in arson and burglary, the house must be laid as that of the party actually dwelling therein. And as to the two last counts, the offence charged was the sending the letter to G. Ley, threatening to burn the house of T. Elliott, which was held not to be an offence within the repealed clause of the 27 Geo. 2, c. 15, *R. v. Paddle*; (u) and Maule, J., was of opinion that the offence was not within the meaning of the statute. It must otherwise be admitted that if a party should have any

(r) *R. v. Carruthers*, 1 Cox, C. C. 138.

(s) *R. v. Boucher*, 4 C. & P. 562.

(t) *Gill's case*, 1 Lew. 305. The learned judge seemed to think that a threat to

prosecute would amount to a threat to accuse within the meaning of the Act. See

*R. v. Abgood*, 2 C. & P. 436, *post*, p. 714.

(u) *Post*, p. 713.

interest whatever in a house, such as a reversion expectant on the determination of a particular estate, however remote or contingent, the house would be sufficiently described as 'his.' As to the other counts, the offence charged was that of sending a letter to A., threatening to burn the house of B., which, according to the case cited, was not within the Act. (v)

But where the question was reserved, whether threatening a landlord to burn his house, which was let to a tenant and in his occupation, the Court avoided deciding the question; but Alderson, B., said, 'But for the cases, I should have thought the construction of the statute was "any of the houses of any of Her Majesty's subjects."' (w) And it is conceived that such a case would clearly be within the large words of the later enactment, and it is very reasonable that it should; for the injury to the landlord might, and generally would, be very much greater if the house were actually burnt than to the tenant.

An indictment alleged that J. Rowlands had 'finished and completed a house at T.,' and that the prisoner sent a letter to T. Lewis, directed to him by the name of 'Mr. T. Lewis,' &c., threatening to burn 'the house so built by the said J. Rowlands.' The letter was in the prisoner's writing, and was found in a cleft stick stuck in the ground close to Lewis's house, and was shewn by him to Rowlands. Lewis had been tenant of the premises, and after him Rowlands became tenant, and had built a house on the premises. It was objected that the letter was intended for Lewis and not for Rowlands, and that the indictment should have stated that the letter was sent to Rowlands, or that he received it. The jury found that the prisoner sent the letter, intending that it should reach Rowlands as well as Lewis; and, upon a case reserved upon the question 'whether the prisoner, upon this indictment and these facts, was properly convicted,' the judges were unanimously of opinion that the indictment was bad. (x)

The word 'accuse' in the 7 & 8 Geo. 4, c. 29, s. 7, meant to charge the prosecutor before any third person, and 'threatening to accuse' meant threatening to accuse before any third person. The first count of the indictment was for extorting money by *threatening to accuse* the prosecutor of an unnatural offence; the second count for extorting it by *accusing*, &c. The prisoner accosted the prosecutor, and after intimating to him that he and another person had seen him in the act of committing the offence alluded to, added, 'Well, sir, we don't want to say anything about it; give us our allowance-money, and we will say nothing about it.' The prosecutor gave him five shillings. It was objected that the words proved did not amount to a threat to accuse, or an accusation within the 7 & 8 Geo. 4, c. 29, s. 7. That the word 'accuse' imported a charge made before a magistrate, or some judicial tribunal. But Patteson, J., was clearly of opinion that the words spoken by the prisoner did bring the case within the Act. By the former law it was a felony to extort money by threatening to accuse the prosecutor to any third party; and

(v) *R. v. Burrigge*, 2 M. & Rob. 296.

(w) *R. v. Grimwade*, 1 Den. C. C. 30, 1 C. & K. 592.

(x) *R. v. Jones*, 1 Den. C. C. 218, 2 C. & K. 398, E. T. 1847. In the latter report it is stated that the judges held that the indictment was bad, and that the threat must be to the owner of the property; and that if the letter was sent to Lewis with intent that it should reach Rowlands, and did reach him, it should have been charged

in the indictment as sent to Rowlands. It is to be observed that the indictment was clearly bad on the ground that it neither stated that the house was the property of or belonged to Rowlands, but only that he had 'finished and completed a house,' 'for the future dwelling of himself,' &c.; and the decision that the count was bad may have been on this ground. The new clause would plainly include such a case if the count were properly framed.

it was not necessary that the threat should be that of accusing by course of law; and the 7 & 8 Geo. 4, c. 29, s. 7, being declaratory of the former law, could hardly be construed as less extensive in its operation; neither was it necessary to construe the term 'accuse' in two different senses; the term 'accuse' throughout the Act meant to charge the prosecutor before any third person, and 'threatening to accuse' meant to charge before any third person. (y)

The prisoner was indicted for sending to J. H. a letter demanding money from her with menaces. The letter sent by the prisoner to the prosecutrix alluded in threatening and mysterious language to facts injurious to her reputation, and added that if she did not write by twelve o'clock on a certain day, he would explain all to her father, brothers, and friends. The prisoner afterwards sent a letter to the father, in which the prisoner stated that he had received instructions to subpoena his daughter, J. H., as a witness against a brothel, which brothel his daughter had frequently visited, during the last two months, in company with an officer. J. H. was too ill to attend as a witness on the trial, and on the part of the prisoner it was suggested that, as the fact of her having gone to the brothel was not negatived, it could not be concluded that the prisoner had not reasonable and probable cause for the accusation he threatened to make; but Rolfe, B. (Williams, J., being present), told the jury that in his opinion the words 'reasonable and probable cause,' as used in the Act of Parliament, applied to the money demanded, and not to the accusation constituting the threat; and that if the lady had in fact gone to the brothel, it would not have made any difference in the case. (z)

An indictment alleged that the prisoner sent the following letter to S. Hill, threatening to burn his houses, barns, ricks, and stacks of grain: —

'It is the provence of the Allmighty that is gest com to my knolege aboute your treatment of yourself and whife to the old man yet made him do jest as you like so I warne you shant do jest as you plase with me. If william is so quoiety you shant find it the case with me; let you go wear you like you shore to be found out, you meae think that goine to be safe becose you goine to leve the Lizard; the a specimen of it in Mallion for you to go by. Prapes you mat read of Sampson Ridle and the fox Philistines. If no foxes to bit got thee may somfing in steed. If the not somfin don very shortly you not go onponished. I warne you I not prise you of any more. I think you injoyment will be very short in this world. Silfishness will not indoer long.

'I jest let you know wot I meane you; you ben a very great enemy to me; bot by god I not forgit you if my life is spared. Vingens is mine, and I will repaire so shore is a god in heving. So no more.

'JOSEPH MITCHELL.'

There had been incendiary fires in Mallion to houses, barns, and stacks of corn, and a quantity of standing barley had also been burnt. The father of the prosecutor and prisoner had died, and left all his property to the prosecutor, and this had much enragged the prisoner, and they were on bad terms. The prisoner had said that he had not been served fair about his father's property, and that he had written a letter to his

brother to frighten him, and get some of the property, and that he had said in it that he would serve him as Sampson did the Philistines, and that Sampson had tied two foxes' tails together, with a firebrand between them, and sent them into the standing corn. Pollock, C. B., held that there was no evidence of any threat to burn, except to burn standing corn. The statement of the prisoner of what he meant by what he had written in the letter, must be taken into consideration in attaching a meaning to that letter, and the allusion to Mallion might well be explained to mean the same thing, as it was shewn that standing corn was burnt there as well as houses. The fair construction to be put on the letter was that it contained a threat to burn the standing corn of the prosecutor, and, if so, that was not an offence within the statute. (a)

It was decided that the sending a letter signed with *initials* only, was sending a letter *without a name*, within the 9 Geo. 1, c. 22. (b)

In a case where the indictment, which was framed upon the 30 Geo. 2, c. 24, charged the prisoner with sending a threatening letter, intending 'to extort and gain money,' it was holden not to be supported by evidence of a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain *bill* drawn by the prisoner, and of which the prosecutor was the holder. (c)

**Evidence of sending letter.** — In a case where the question arose whether there was sufficient evidence of the prisoner's having sent the letter in question, knowing its contents: the facts were that the prosecutor proved the receipt of the letter by the penny post, at his house, in a street near Berkeley-square, in the county of Middlesex, and his tracing it up to one Elizabeth Robinson, who swore that she was employed in going errands for the prisoners in Newgate, and that having received this letter from the prisoner's hands at the grate at Newgate, she immediately carried it to the post-office in Newgate-street. And the servant of the office-keeper confirmed her account, and both swore to the identity of the letter, the direction being in a remarkable hand. The case was left to the jury, with a direction to consider whether from the prisoner's delivering the letter he knew the contents of it; and the jury, having found the prisoner guilty, the question was submitted to the consideration of the judges, whether there were sufficient evidence to be left to the jury of the prisoner's sending the letter, knowing the contents. The judges held that the conviction was right. (d)

The prisoners, who were husband and wife, were indicted on the 9 Geo. 1. c. 22, and the 27 Geo. 2, c. 15, for feloniously sending a threatening letter to their master, demanding £10. The wife wrote the letter, and it was delivered to the prosecutor by the husband, who said he found it in the prosecutor's garden; but there was no evidence that he had any knowledge of its contents. It was objected on behalf of the prisoners that the offence described by the statutes on which the indictment was founded was 'knowingly sending a threatening letter,' whereas the evidence only shewed that the wife had written the letter, and that the husband had delivered it, and that there was no proof of its having been sent to the prosecutor. The Court (Ashhurst, J., and Perryn, B.), agreed that merely writing a threatening letter would not constitute the offence within these Acts of Parliament; that carrying a letter could not be comprehended under the word 'send' in the statutes; that the

(a) *R. v. Hill*, 5 Cox, C. C. 283.

(b) *Robinson's case*, 2 Leach, 479. 2 East, P. C. c. 23, s. 2, p. 1110. *Ante*, p. 702.

(c) *Major's case*, 2 Leach, 772. 2 East P. C. c. 23, s. 3, p. 1118.

(d) *Girdwood's case*, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. *Ante*, p. 703.

legislature had it not in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived; and that the act of delivering a threatening letter was not the offence described in those statutes. That if any doubt could be entertained upon that point, the legislature itself had removed it, for by the subsequent Act, 30 Geo. 2, c. 24, the offence of delivering as well as sending a threatening letter was made a misdemeanor, punishable at the discretion of the Court, according to the circumstances of the case. But the Court further observed, that there was still a question for the consideration of the jury; for though M. H. were the wife of the other prisoner, yet if the jury were of opinion that she wrote the letter itself without any intervention of her husband, and sent it by him, without his knowing anything of the contents, to the prosecutor, she alone might be found guilty; but that otherwise both the prisoners must be acquitted. (e)

In a case where the prisoners were indicted for sending a letter, the proof was that the letter was of the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the yard of the prosecutor, from whence it was taken by a servant of the prosecutor, and delivered to him. (f) And in another case the proof was that the letter in question was in the handwriting of the prisoner, who sent it to the post-office, from whence it was sent in the usual manner to the prosecutor. (g) In another case, where it was proved that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning before service began, from whence the sexton had picked it up, and delivered it to him, Yates, J., said that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands. (h) And in a subsequent case it was holden that dropping a letter in a person's way, in order that such person might pick it up, was a *sending* of the letter to such person. (i) In a case upon the 27 Geo. 2, c. 15, it was decided that in order to bring the offence within that clause, it was necessary to prove that the letter was sent to the person threatened; and also that sending it to A., in order that he might deliver it to B., was a sending to B., if it were so delivered. A letter threatening to burn the house of Rodwell, and the stacks of Brook, was sent to Kirby, and the indictment charged the sending it to Kirby. Upon a case reserved, the judges held that a sending to Kirby, as Kirby was not threatened, was not within the statute; and upon that account the judgment was arrested; but they intimated, that if Kirby had delivered it to Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, this would be

(e) R. v. Hammond, 1 Leach, 444.

(f) R. v. Jepson, 2 East, P. C. c. 23, s. 2. p. 1115. *Ante*, p. 703.

(g) Heming's case, 2 East, P. C. c. 23, s. 2, p. 1116. Chambre, J.

(h) Lloyd's case, 2 East, P. C. c. 23, s. 5, p. 1122. The case was submitted to the judges on another point, on which the indictment was holden to be defective (see *post*, p. 714), so that it became unnecessary for them to give any opinion on the point above stated. In 2 East, P. C. *ubi supra*, the learned writer in note (a) says, 'Qu. whether, if one intentionally put a letter in a place where it is likely to be seen and read

by the party for whom it is intended, or to be found by some other person, who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending to *such party*, supposing such an allegation to be necessary upon the true construction of the Acts! The same sort of evidence was given in Jepson's case (*ante*, p. 703) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form.'

(i) R. v. Wagstaff, R. & R. 398.

a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect. (j)

A count charged the prisoner with sending a letter to one W. Brown, threatening to burn his house. The letter was left by the prisoner at a gate in a public road near Sir J. Rowley's house, directed to 'Sir Joshua Rowley, Baronet, Stoke, Suffolk.' Having been found there by one of the witnesses, it was forwarded by him to Sir J. Rowley's house, and there deposited in the steward's room, and there opened by the steward, who read it, but instead of delivering it to Sir J. Rowley, he handed it to a constable, who afterwards shewed the letter both to Sir J. Rowley and Brown, who occupied a house under Sir J. Rowley, under an agreement, two years of which remained unexpired. Alderson, B., directed the jury to consider whether, in leaving the letter as before described, the prisoner intended that it should not only reach Sir J. Rowley, to whom it was directed, but that it should also reach Brown, and then, if they thought so, the learned Baron was of opinion that would be a sending to Brown; and the jury having convicted, upon a case reserved, the judges were of opinion that the conviction was right. (k)

The prisoner was indicted for sending a threatening letter to the prosecutor. The letter was proved to have been affixed to a gate in a public highway, near which the prosecutor would be likely to pass from his house; and Cresswell, J., held, 'that if it were proved that the prisoner wrote the letter and affixed it on the gate, it was a question for the jury whether he did so with an intent that it should come into the prosecutor's hands; for, if so, it would be a sending.' (l)

Where a prisoner was indicted under the 4 Geo. 4, c. 54, for sending a threatening letter to the prosecutor, and the only evidence against him was his own statement that he should never have written the letter but for W. Goodes; Lord Abinger, C. B., held that there was no evidence of the prisoner having sent the letter; as upon this evidence Goodes might have taken the letter or might have sent it himself, having made the prisoner write it; and there was no evidence of the prisoner having directed Goodes to take it. (m)

One count charged the prisoner with sending a letter to the prosecutrix threatening to kill her; another with uttering the same letter. The prisoner was seen by a witness to put a small brown paper parcel containing the letter under the table-cloth in the kitchen of the house where both the prisoner and prosecutrix were in service. The witness afterwards lifted up the cloth, and found the parcel, and the letter in it. The witness gave the parcel to the prosecutrix, to whom the letter was directed. It was contended that there was neither a sending of the letter, nor an uttering of it to the prosecutrix. It was answered that there was a sending, or, at all events, an uttering, as there could be no doubt the prisoner placed the letter on the table for the purpose of its reaching the prosecutrix by some means; and Patteson, J., held that there was no evidence of an uttering. (n)

(j) *R. v. Paddle, R. & R. 484. See R. v. Burridge, ante, p. 709.*

(k) *R. v. Grimwade, 1 Den. C. C. 30, 1 C. & K. 592.* In the latter report Alderson, B., said, 'The whole act of the prisoner ceased when he left the letter; and if he left the letter with intent that it should go on, that is a sending it; and what the constable did with it afterwards, I think, is immaterial.'

(l) *R. v. Williams, 1 Cox, C. C. 16.* This would clearly be an uttering now.

(m) *R. v. Howe, 7 C. & P. 268.*

(n) *R. v. Jones, 5 Cox, C. C. 226.* Patteson, J., took time to consider whether he would reserve the question, but did not do so, as he was satisfied he was right in his opinion. It must not be assumed that Patteson, J., held that there was not a sending. In passing sentence he said, 'Your learned counsel has stated some difficulties in point of law. I do not think there are any.'

**Indictment.**—It was decided, upon reference to the judges, that it was necessary to set forth the threatening letter in the indictment, in order that the Court might see whether it fell within the purview of the respective statutes. It was contended, in support of the indictment, upon which the point was raised, that it pursued the words of the 9 Geo. 1, c. 22 (now repealed); that the defendant was charged with sending the letter ‘feloniously and contrary to the form of the statute;’ and that those words imported that the letter was of such a nature as the statute had in view. But the judges were of opinion that the indictment was bad in not setting forth the letter itself: and that if the words, ‘feloniously and contrary to the form of the statute,’ were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law. (o)

Where some counts charged the prisoner with threatening to accuse the prosecutor of an infamous crime with intent to extort from him a valuable security for the payment of fifty pounds, and others laid the intent to be to extort money from him; Platt, B., held that the indictment was good, though it did not allege whose property the security or money was. The term ‘extort’ has a technical meaning, and the very import of the word shews that the prisoner is not acquiring possession of his own property: and in this case, whether anything is obtained or not, the crime is complete, and therefore, whether the property belongs to the person threatened or not, is quite immaterial. (p)

But the indictment must aver *from whom* the money, &c., was demanded; and if the indictment be for threatening to accuse, &c., it must allege *who* was the person threatened. (q)

An indictment on the 4 Geo. 4, c. 54, s. 5, charged that the prisoners did feloniously, with intent to extort money, charge and accuse J. N. with having committed the horrible and detestable crime, &c., and did feloniously, with intent to extort, &c., menace and threaten to prosecute the said J. N. for the said pretended offence; it was objected that the charge contained in the indictment was not within the terms of the 4 Geo. 4, c. 54, s. 5, which applied only to threatening to accuse prospectively, and not to a threat to prosecute a charge antecedently made; and Garrow, B., after consulting Burrough, J., held that the objection must prevail. If the indictment had followed the terms of the statute, and it had been proved that the prisoners had threatened to prosecute J. N., the case would have been left to the jury to say whether that was not a threatening to accuse them. But the offence laid in the indictment was not sufficiently charged under the statute. (r)

It was also held to be necessary that the indictment should allege an intent of the writer in sending the letter consistent with and deducible from the letter itself. In a case already mentioned, where the indictment charged that the letter was sent to extort *money*, and it appeared upon the face of the letter that it was sent with the view of inducing the prosecutor to give up a bill of exchange, the judges held the allegation not to be sustained. (s)

If the indictment state the offence of which the prisoner threatened to accuse the prosecutor, it must state it correctly. There were several counts in an indictment, charging the prisoner with threatening to accuse

(o) Lloyd's case, *ante*, p. 712, note (i). And the law of this case was recognised by Grose, J., in delivering the opinion of the twelve judges in Hunter's case, 2 Leach, 631.

(p) R. v. Tiddeman, 4 Cox, C. C. 387.

(q) R. v. Dunkley, R. & M. 90.

(r) R. v. Abgood, 2 C. & P. 436. See Gill's case, 1 Lew. 305, *ante*, p. 708.

(s) Major's case, *ante*, p. 711.



the prosecutor of the crime of sodomy, and it appeared to Littledale, J., that the letter written by the prisoner only imputed to the prosecutor that he had solicited the prisoner to permit him to commit that crime; he therefore directed the jury to acquit the prisoner on those counts. (t)

On indictments on the 7 Geo. 2, c. 21, for assaulting, and by menaces, &c., demanding money, &c., with intent to rob, it was the better opinion that an express demand of money by words was not necessary; and that the fact of stopping another on the highway, by presenting a pistol at his breast, was, if unexplained by other circumstances, sufficient evidence of a demand of money to be left to the jury. It was observed that the unfortunate sufferer understood the language but too well; and the question was put, 'Why must Courts of justice be supposed ignorant of that which common experience makes notorious to all men?' (u) And in one case upon that Act the Court appears to have considered that an *actual demand* was not necessary; and that whether there was a demand or not was a fact for the consideration of the jury under all the circumstances. (v)

**What menaces are sufficient.** — The prisoner applied to the prosecutor for work, and being refused he asked for a shilling, and being again refused, he became very abusive, and threatened 'to burn up' the prosecutor. He then went into a neighbouring stack, and knelt down close to it, to strike a lucifer-match, but, discovering that he was watched, he blew out the match and went away. No part of the stack was burnt: and on an indictment for attempting to set fire to the stack, the jury were not satisfied that he intended to set fire to the stack, but they thought that he intended to extort money from the prosecutor by his conduct, and an acquittal was directed; but the prisoner was ordered to be detained on the charge of demanding property with menaces, on the ground that, assuming the finding of the jury to be correct, the prisoner was liable upon such a charge under the 1 Vict. c. 87, s. 7. (w)

The prisoner was indicted for delivering to C. H. Marsh letters demanding of him 10,000 francs, being of the value of £400, with menaces and without reasonable and probable cause. The originals in French were thus translated:—

'The bearer of this note is ignorant of all. I am in Stamford, and as you have neither answered my prayers nor my threats, I have considered that it was better to come as far as here, for you would not answer me without doubt at London. I have eight letters to restore to you, which are very compromising; for there are some of them old ones. (I see the bottom of your heart.) Well! in spite of that, if I had not really need of money to continue that which I have commenced, which is really above my means, I would not ask you anything to-day; but it is for me a question of life or death; I must have 10,000 francs. See that which you have to do! When I have told you that I loved you, it was true and sincere. Well, in spite of the hatred which I experience, it causes me pain to demand them of you. I return entirely the promises you have made about your uncle, and wish not for the future to hear speak more of you; for with all the sacrifices that you have made for me, the heart neither being for nothing, that cannot make me forget that which you have made me suffer. There is my address:—

'Hotel of the Port, Stamford.

'N. MIARD.'

'Thursday, April 16, 1843.'

'P.S. Recal to yourself these words, "With me peace is better than war."'

(t) *R. v. Hickman*, R. & M. C. C.R. 34.

(u) 1 East, P. C. c. 8, s. 11, p. 417.

(v) *R. v. Jackson*, 1 Leach, 267.

(w) *R. v. Taylor*, 1 F. & F. 511. Pollock, C. B., after consulting Cockburn, C. J.

'The person who carries this note to you was ignorant of all yesterday; and as I have not had an answer the person knows all to-day. You may therefore answer him verbally, without fear of compromising yourself further. As I am not false, I ought not to let you be ignorant of that which I have the intention of doing, in case you should not satisfy my demand. This is the plan which I have conceived, and I swear to you I will put it in execution. Firstly, I will go into your church on Easter Sunday, and, reckoning from that evening, I will go into your village, from cottage to cottage, to inform them all of that which has passed. Afterwards I will go to the magistrate at Stamford, from clergyman to clergyman at Peterborough, to all the chapter, and the bishop. I will take afterwards the names of all the bishops of England, and I will write to them all. From there I will go to London, and cause you to be inserted in all the newspapers; afterwards I will go to find the Archbishop of Canterbury, who, being equally instructed, and I will go again to London to the magistrates, and I shall know how to find Clarisse, that she may do so as well as me. I may not be more rich for it; but at least I shall be revenged for all that you have made me suffer.

'Friday Morning, Standwell's Hotel, Stamford.

'N. MIARD.'

'Yesterday I gave you my address incorrectly, but now you cannot make a mistake.'

It appeared that a criminal intercourse between the prosecutor, who was rector of B. and a prebend of P., and the prisoner, had commenced at a house of ill-fame in London, and been renewed in Paris, and subsequently in London again, and the prisoner had received at different times £1,200 from the prosecutor. Tindal, C. J., after referring to the words of the 7 & 8 Geo. 4, c. 29, s. 8, applicable to the case, told the jury 'that parts of this offence have been made out, is perfectly clear; that a letter was sent by the prisoner to the prosecutor making a demand of money with menaces, there is no doubt; what you will have to say therefore is whether that was done without reasonable and probable cause; for it is admitted that the menaces contained in these letters are such as are contemplated by the Act; and indeed the threat of exposing a clergyman, who has been guilty of great vices, in his own church on the most solemn day of the year, of publishing his conduct afterwards to every rank of society in his own neighbourhood, and also of spreading his disgrace more publicly still, can scarcely be said to be such a threat as not to require more than ordinary firmness to resist it; and therefore, according to the proper test laid down by Lord Ellenborough, (x) to be such as not to fall within the meaning of this Act. But the main defence is that there was some just and reasonable ground for the demand made in this case, or that the prisoner at least truly and honestly believed that she had just and reasonable cause for making it; and that is the view which I recommend you to take in applying this evidence. Ask yourselves the question whether this demand was made at a time when the party making it really and honestly believed that she had good and probable cause for making it.' (y)

The prisoner was indicted for demanding money with menaces from J. Bradshaw, and a second count charged a larceny of money. J. Bradshaw owed Stainforth upwards of two pounds for rent, and his agent

(x) In *R. v. Southerton*, 6 East, 126.

the jury is not stated. See *R. v. Chalmers*,

(y) *R. v. Miard*, 1 Cox, C. C. 22. The evidence on which the question was left to

10 Cox, C. C. 450.

signed an authority to Oldfield, a bailiff, to make a distress for that rent. The agent's clerk went with the warrant to Oldfield's deputy, and they and the prisoner, a self-appointed bailiff, went to Bradshaw's house, which was locked up. The authority was returned to Oldfield, who gave no instructions or authority to the prisoner to proceed in the matter of the distress; afterwards the prisoners went to Bradshaw's house, and demanded the rent due to Stainforth, stating that if it was not paid they had a warrant from a magistrate, and would break open the door and make the distress; but that if Bradshaw would pay them five shillings and sixpence for expenses, and sign an I O U for the debt, payable by instalments, they would be satisfied. One of the prisoners shook the door of the house. Bradshaw hesitated, and one of the prisoners left and returned with a policeman. Nothing was said as to what the policeman was to do. The policeman did not speak to Bradshaw. The policeman had only been told that the prisoners had a distress to make. After the appearance of the policeman Bradshaw agreed to pay the five shillings and sixpence, and paid them that sum. He believed that they had authority to distrain. It was objected that no such menace as was contemplated by the 24 & 25 Vict. c. 96, s. 45, was proved, and as to the second count that, if any offence was proved, it was obtaining money by false pretences. The objections were overruled, and the jury were told that the words and conduct of the prisoners, if they believed the facts, constituted a menace within the meaning of the statute. The jury said that they considered the statement made by the prisoners that they had a warrant signed by a magistrate (which was untrue), supported by their procuring a policeman to give them a supposed authority to break into the house, and shewing the intent by violently shaking the door, was a menace within the meaning of the Act, and found both prisoners guilty generally; and, on a case reserved, Wilde, B., after argument, delivered judgment. 'The question turns upon the proper construction of the 24 & 25 Vict. c. 96, s. 45. There are many demands for money or property accompanied by menaces or threats, which are obviously not criminal nor intended to be made so. Thus in a case of disputed title to personal property, a man may threaten his opponents with personal violence if he does not relinquish the subject of the dispute, and he would not be within the intention of the statute. (a) Other instances would offer themselves to a little consideration. Where, then, is the proper limit to the operation of this section? It is to be found in the words "with intent to steal." There is no other restriction expressed. Nothing is said about "violence" in conjunction with menaces, still less of violence to the person as distinct from violence to property. There is no express limit, except in the words "with intent to steal." Now a demand of money with intent to steal, if successful, must amount to stealing. It is impossible to imagine a demand for money with intent to steal, and the money obtained upon that demand, and yet no stealing. (b) The question then arises, what are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing? It is said in East, (c) "the taking must in all cases be against or without the consent of the owner to constitute larceny or robbery." On the other hand, it is said at the

(a) This is a faulty illustration. The case would not be within the statute because there would be no intention to steal, however violent the menaces might be. C. S. G.

(b) This is a manifest error. If a man

makes a frivolous demand of money without any pretence for the demand, and thereby obtains the money, this is clearly no larceny. C. S. G.

(c) 2 East, P. C. c. 16, s. 3, p. 555.

same place, "a colourable gift, which in truth was extorted by fear, amounts to a taking and a trespass." These two passages, when taken together, appear to define the offence of stealing in the case of menaces. For if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. Accordingly, in the cases cited in the argument, (d) the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. Now to apply this principle to the present case, a threat or menace to execute a distress warrant is not necessarily of a character to excite either fear or alarm. On the other hand, the menace may be made with such gesture and demeanor, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect: and this should be decided by the jury. Now in this case there was evidence very proper to be left to the jury to raise the above question. But the chairman left no such question to them, and directed them as a matter of law that the conduct of the prisoners (if believed) constituted a menace within the statute. Our judgment that this conviction cannot be sustained is founded entirely on this ground.' (e)

If a person with menaces demanded a sum of money from another, and that other did not give it him, because he had it not with him, it was within the 7 & 8 Geo. 4, c. 29; but if the person demanding the money knew that the money was not then in possession of the party, and only intended to obtain an order for the payment of it, it was otherwise. (f)

The first count charged the prisoner with accusing the prosecutor of having made a solicitation to him, whereby to induce him to commit with the prosecutor the crime of b——, with a view to extort money from the prosecutor. The second count charged the prisoner with having accused the prosecutor of having made a solicitation to him, whereby to induce him to permit the crime of b—— to be committed by the prosecutor. About half-past ten at night the prisoner, dressed in a soldier's uniform, accosted the prosecutor as he was passing down Hemming's Row, endeavoured to whisper to him, and stopped and asked what hour it was, and, receiving for answer, 'I don't know exactly, but it is past ten,' attempted to whisper several times again, but, the pros-

(d) *R. v. Parfait*, 1 East, P. C. c. 8, s. 11, p. 416. *Simons' case*, 2 East, P. C. c. 16, s. 131, p. 731. *Taplin's case*, 2 East, P. C. c. 16, s. 128, p. 712.

(e) *R. v. Walton*, L. & C. 288. No notice was taken of the question raised on the second count. This decision requires reconsideration, as it obviously proceeds upon the fallacy of supposing it necessary that the menaces should be such that if property were obtained by them the offence would be larceny. Now the words of the clause warrant no such construction. The words are 'who-soever shall by menaces, or by force, demand any property, &c., with intent to steal the same.' Any menaces or any force, therefore, clearly satisfy the terms of the clause, provided there be an intent to steal. It might just as well be said that, on an indictment for an assault with intent to rob, or for

wounding with intent to murder, it was necessary to prove such an assault in the one case, or such a wounding in the other, as would be sufficient to effectuate the intent, and yet it has never been doubted that any assault, however slight, or any wound, however trivial, was sufficient, provided the intent were proved. In truth the criminality in these cases depends on the intent. The effect of this decision is to render the clause almost inoperative; for where the menaces have not obtained the money, it is plain a jury will be very reluctant to find that they were sufficient to obtain it. The whole offence consists in the acts and intent of the prisoner; and it is quite beside that to consider what the effect on the prosecutor might be. C. S. G.

(f) *R. v. Edwards*, 6 C. & P. 515. *Bosanquet and Patteson*, JJ.

ecutor drawing back, what the prisoner said in such whispers was inaudible. The prisoner followed the prosecutor for a considerable time, through Green Street, Leicester Square, Panton Street, into Jermyn Street, and into the Haymarket, Piccadilly, and the Regent Circus, and when asked by a person, who interfered for the protection of the prosecutor in Piccadilly, 'What do you mean by annoying this gentleman?' the prisoner replied, 'I know what I mean.' The prosecutor on getting into Regent Circus applied to a policeman to take the prisoner in charge for following and annoying him, and at the same moment the prisoner ran up, and said, 'I charge this person with making an indecent assault on my person.' He afterwards explained this by stating, 'This man came up to me in Orange Street, where I was standing at a watering-place making water, and, putting his hand round a stone, which stood between me and an adjoining urinal, took hold of my private parts.' The same charge was preferred at the station-house, and also before the magistrate, with the addition given in italics below. The prisoner's charge before the magistrate was as follows:— 'Between ten and eleven o'clock last night I was proceeding towards my barracks down Orange Street. I had occasion to stop at a watering-place: while so doing the defendant (prosecutor) came into an adjoining watering-place; there is a partition; he looked round at me; then he put his hands round and caught hold of my private parts. *I said, "What do you mean by that, you d——d old scoundrel?" He made answer, "Don't make a noise for God's sake," and left the place immediately.* I followed him. He went into a tobacconist's shop; he came out in two or three minutes, caught hold of a young man's arm, and they walked on. He said to me, "Which way are you going?" I made him no answer. He stopped, and said, "I am going the reverse way to you." He turned round to the right; I still followed him; he stopped, and asked me what I was following him for. I told him I wanted to get a constable; he turned back again; I followed him to Regent Circus, when I gave him in charge.' On cross-examination he said, 'I made a charge on the 12th of July last against a gentleman named Williams of a similar nature. I never made any other charge of this sort against any person; I have never been summoned to appear against Williams.' According to the evidence the prosecutor had not been in an accommodation-place that evening with the prisoner or any other person, but being followed by the prisoner, and observing a cigar shop, he inquired where he could find a policeman; the prisoner was at that time looking in at the window of the cigar shop, and afterwards continued his annoyance to the prosecutor by following him when he came out of the shop. A young man upon this volunteered his protection to the prosecutor, and put the question before mentioned to the prisoner. The jury convicted, and, upon a case reserved upon the question whether there was sufficient evidence to go to the jury, and to sustain the verdict on the said two counts, which alleged a solicitation to commit a capital offence in the express terms of the statute, the prisoner's counsel contending that the evidence only proved a charge of an indecent assault, the judges were unanimously of opinion that, if the charge were confined to the charge before the magistrate, it could not be with intent to obtain money. But five of the judges (*g*) thought that the previous conduct of the prisoner, coupled with the charge (before the magistrate) was sufficient evidence for the jury to convict the prisoner on this indictment. Seven of the judges (*h*) thought otherwise. (*i*)

(*g*) Lord Denman, C. J., Tindal, C. J., B., Coltman, Patteson, Coleridge, and Cresswell, JJ.  
 (*h*) Pollock, C. B., Alderson, B., Rolfe, (*i*) R. v. Middleditch, 1 Den. C. C. 92.

On a count charging the prisoner with having accused H. C. S. of having solicited him to commit an infamous crime, it appeared that the prosecutor had taken shelter from the rain under a portico of Buckingham Palace, and that the prisoner, who was a sentry on duty there, after some conversation, had seized the prosecutor and charged him with having indecently touched or assaulted him, and then took him to the guard-house and said, 'I charge this man with indecently assaulting me.' When the case was heard before the magistrate the prisoner stated that the prosecutor caught hold of his private parts. It was contended that this was a charge of assault and not of solicitation; and as the Act had both 'assault' and 'solicitation,' they were intended to be different things: the one an act done; the other a solicitation, in its strict sense. Cresswell, J., 'Suppose the case of an assault with intent to commit a rape; that means an assault made with an intention to use force and to commit a rape if possible: but it often happens that a very indecent assault is committed with no intention of resorting to further violence, if resistance is offered, but merely in the hope that the woman's scruples may be overcome. Now, supposing that a man's soliciting a woman to yield her person to him was an offence, might not such an indecent assault, committed for such a purpose, be treated as a solicitation, in case the evidence fell short of proving an attempt to commit a rape? In short, may there not be a solicitation by deeds as well as by words?' And after holding that neither the charge made at the guard-house nor before the magistrate could be taken into consideration because neither could have been made to extort money; Cresswell, J., said, 'I think that, although the prisoner charged the prosecutor in terms with an assault, throughout the transaction and afterwards, yet it was with an assault of such a character and made under such circumstances that it might be taken to mean a solicitation. It is a question which the jury must determine.' (j)

One count charged Braynell and Wren with threatening to accuse the prosecutor of an assault with intent to commit an abominable crime; another of an attempt to commit such a crime; two others of a solicitation to commit and permit, &c. Four other counts alleged that the prisoner did accuse the prosecutor as in the first four counts, and the last charged the prisoner with a demand of money, with menaces, &c. The prosecutor was looking into a shop-window, and felt some one press against him, and, on looking round, saw Braynell, who a moment afterwards pressed his private parts against the prosecutor's hand. He immediately walked away, and Braynell followed him, and asked what he meant by taking indecent liberties with him. Wren was then present. The prosecutor denied that he had done what was alleged. Braynell said, 'Do you think that I would allow you to do that for nothing?' He then asked what the prosecutor would stand, and suggested that they should go into a public-house to settle it. The prosecutor refused.

There was a third count, which merely charged the prisoner with accusing the prosecutor of a certain infamous crime with intent to extort money; as to which the prisoner's counsel contended — whether in arrest of judgment or not does not appear — that it was insufficient; for that, although the legislature had defined what it includes under the terms 'infamous crimes,' yet this did not excuse the prosecutor from particularising the specific charge. The report does not expressly state the decision of the Re-

corder upon this point, but it seems that he must have held the objection good; as he reserved for the opinion of the judges the further question, 'whether a general judgment upon the finding of the jury on the whole indictment is rendered void or voidable by the insufficient statement of the offence charged in the third count;' but the decision of the other question rendered it unnecessary to consider this question.

(j) R. v. Cooper, 3 Cox, C. C. 547.

Braynell said he must take the consequences. The prisoner shortly afterwards gave the prosecutor into the custody of a policeman who came up, and he was taken to the station, where Braynell signed the following charge: 'Indecently assaulting J. Braynell at Hemming's Row,' &c. Wren signed it as a witness. The next day the prisoners were examined as witnesses before a magistrate, when the charge was gone into, and were cross-examined in the absence of each other, and the charge dismissed. Williams, J., held that the examinations in chief of the prisoners were admissible in evidence against them, as they were then under no charge, and were not bound to say anything to criminate themselves. The cross-examination of Braynell was principally directed to ascertain how he had employed himself, and whether he and Wren had been together on the day in question; and his answers were not only contradictory in themselves, but quite inconsistent with those of Wren, when he was afterwards cross-examined. (*k*) Williams, J., held that the cross-examinations were not admissible. It was no doubt most material that these questions should have been asked before the magistrate, because it was most important to ascertain the amount of credit to be attached to the evidence of the prisoners, but no such connection between these answers and the particular charge in this indictment could be perceived as would justify their being held to be relevant. (*l*) It was then objected that the evidence did not support the first eight counts, as the evidence only shewed a charge of an attempt to commit an indecent assault. But Williams, J., held that it was for the jury to say, judging from the prisoners' whole conduct, what was the accusation that they intended to make. (*m*)

Where the prisoner was indicted for sending a letter to the prosecutor threatening to accuse him of an infamous crime with intent to extort money, Martin, B., told the jury that the question for them to determine was whether the prisoner intended to extort money, and that it was nothing that he denied it, if his own acts and conduct, and his meaning, as indicated by his letters, plainly proved that such was the real object. That was the sole question: the truth of the charge did not matter. (*n*)

The prisoner was indicted for sending to the prosecutor the following letter, threatening to burn and destroy his houses, &c.:—

'SIR,—This is to inform you that you are better not let your farm to any of your family; if you do, you will suffer as before. You know how felt the other day.

'A CAUTION FRIEND.'

It was proposed to ask the prosecutor what he considered was the meaning of the letter, and on this being objected to, Erle, J., said, it appeared to him that the answer to the question was admissible. The offence intended by the statute was a threat to burn the premises, and

(*k*) Williams, J., looked at the depositions to ascertain the nature of the cross-examinations.

(*l*) With all deference this ruling seems to be erroneous. The material question on the trial of this indictment was whether the prisoners had made a false charge, and it was most material to ascertain all that they had said, which shewed their evidence before the magistrate to be false. If they had made the same statements elsewhere, it cannot be

questioned that they would have been evidence, and their being made before the magistrate could make no difference, unless there had been any such undue influence used as would exclude them. The truth of the evidence of the prisoners in chief was just as much in issue before the jury as before the magistrate. C. S. G.

(*m*) R. v. Braynell, 4 Cox, C. C. 402.

(*n*) R. v. Menage, 3 F. & F. 310.

that threat must be in writing, and the thing intended to be prevented was the misery occasioned to the party who had received the intimation that his premises would have the calamity of fire brought upon them. Unless the law went so far as to make it punishable to create that fear by any language the author knew would create that fear, the law would be powerless. The very fact of saying ironically, 'I don't say you are a thief,' could be expressed in such way as to make anybody understand that the party meant to make that charge; and, although there might be no single word in the letter which by itself would appear to mean so to a stranger, yet the party receiving it would perfectly well understand it. The jury must be satisfied that when he wrote those words — 'You will suffer as before' — the writer intended to create in the mind of the party receiving the letter the fear that his house would be burnt down. Evidence might be offered that, under the particular circumstances, the words had not their ordinary meaning, but the meaning imputed to them upon the record, and therefore the witness might be asked whether he understood the meaning to be that which the record imputed. (o)

**Venue.** — The 9 Geo. 1, c. 22, provided that offences against that Act might be tried in any county of England; but no such provision being made with respect to offences within the other repealed statutes, the trial of such offences was governed by the general rule. Upon this rule the trial might be in the county in which the prosecutor received the letter by the post, though delivered by the prisoner and put into the post in another county. (p) And it seems that the offender might be tried in the county in which he sent the letter, though the prosecutor received it in another county. The offence of *sending* a threatening letter would seem to be complete, as far as depends on the offender, by his putting the letter into the post-office to go into another county; though the party to whom it is sent afterwards receives it in the latter county. (q) The post-office marks in town or country, proved to be such, are evidence that the letters on which they appear were in the office to which those marks belong at the dates which the marks specify; (r) but a mark of double postage paid on any such letter is not of itself evidence that the letter contained an enclosure. (s)

**Evidence to explain letter.** — The prisoner was tried for feloniously sending to J. S. Tucker the following letter, with intent to extort money from the said J. S. Tucker: —

'SIR,

'You perhaps did not expect to hear from me so suddenly: but when you turned me away from Laytonstone for a mere trifle (that too at a

(o) *R. v. Hendy*, 4 Cox, C. C. 243. Mr. Moody gave me this note of this case: an indictment averred that a fire of certain premises of the prosecutor had taken place, and that the prisoner sent a letter threatening to burn the house, &c., of the prosecutor, which was set out, and to the words, 'you shall suffer as before' added, 'meaning the said fire;' and Erle, J., allowed the prosecutor to be asked 'what meaning he, at the time he received the letter, put on these words?' C. S. G.

(p) *Girdwood's case*, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120, *ante*, p. 240, where the letter was *received* by the prosecutor in Middlesex, and the trial had in that county, though the letter was delivered by the prisoner to a woman in London, and by her put

into the office, which was also in London. *Esser's case*, 2 East, P. C. c. 23, s. 7, p. 1125, where the offence was laid in Middlesex, though the letter was dated from Maidstone, in Kent, and sent by the post from Maidstone; and Lord Mansfield held that as the letter was directed to the prosecutor in Middlesex, where it was delivered, that was a *sending* in Middlesex, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county.

(q) 2 East, P. C. c. 23, s. 7, p. 1125. *Burn. Just. tit. Letter*. And see now the 7 Geo. 4, c. 64, s. 12, vol. i. p. 5.

(r) *Perkins's case*, 1 Lew. 99, J. A. Park, J. *R. v. Burdett*, 4 B. & A. 95.

(s) *R. v. Plumer*, R. & R. 264.



time when by the late failures many scores of clerks were out of employ), you forgot that I had you in my power through your transactions with me five nights following (I have the dates and circumstances on paper written at the time), and that from your conduct to me before I went to live with you, you could expect no mercy from me. Did you not, however, let it pass? In a few words, I have taken advice upon the subject, and know that, if you are obstinate, it is in my power to bring down ruin on your head, and infamy on your name. However, I will be merciful. Allow me to return to L. in the same manner as before. I will never mention it again, as if I did I should lose everything and gain nothing; but it is impossible for me to get any situation in town at present. It is not true that Mrs. T. advertised, as you said; she is in great distress, and she is my mother, therefore I would wish to afford her a little relief, if possible; so send me five pounds to my address, which, with the other you lent me, I will I O U for, and pay when I get a place. If I do not hear from you by Saturday morning, you will hear of it (enclosing five pounds). Now, consider ruin and beggary on one side, and wealth and comfort on the other; remember that, if you are obstinate, it will cost you *all*; do as I say, it will cost you nothing. I wait your answer before I proceed. As yet, I have given Mr. Norris no names, On Saturday night (if you are silent) I will go too far to retract.

‘Your’s obediently,

(Signed) ‘JAMES TUCKER, Junr.’

The second count charged the prisoner with threatening to accuse the said J. S. Tucker of a certain infamous crime, viz., with attempting and endeavouring to commit the abominable crime of sodomy with the said J. Tucker, with the same intent. The third count charged him with threatening to accuse the said J. S. Tucker of an infamous crime, with the same intent. The fourth, fifth, and sixth counts were the same as the former, except that the letter was called a paper-writing, and the direction omitted. The third and sixth counts did not describe the specific crime, but alleged, generally, an infamous crime. All the counts concluded against the statute, &c. The prosecutor, after proving the letter in question, said, that on the Saturday following the Thursday on which he received the letter, he saw the prisoner at a public-house in the Strand, and that he, the prosecutor, asked him what he meant by sending him that letter, and what he meant by ‘transactions five nights following.’ The prisoner said that the prosecutor knew what he meant. The prosecutor denied it; and the prisoner afterwards said, ‘I mean by taking indecent liberties with my person.’ The prisoner, in cross-examination, asked the prosecutor whether on his oath he could deny that he did take indecent liberties with his (prisoner’s) person. The prosecutor said he never did. Alexander, C. B., submitted the following question to the judges, whether parol evidence to explain the letter was properly received? Adding, that without it the prisoner could not have been convicted, and that by his cross-examination he in effect repeated the charge. And all the judges (except Littledale, J., who was absent) were unanimously of opinion that such evidence was properly received, and that the conviction was proper. (t)

(t) *R. v. Tucker*, R. & M. C. C. R. 134. It has been held, on the trial of an indictment for threatening to accuse a person of an abominable crime, that the jury need not confine themselves to the consideration of the expressions used before

the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when taken into custody. *R. v. Kain*, 8 C. & P. 187.

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles, J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible. (u)

(u) *R. v. Ward*, 10 Cox, C. C. 42

# STATUTES

RELATING TO THE

## COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.

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11 & 12 VICT. c. 78.

*An Act for the further Amendment of the Administration of the  
Criminal Law.*

[31st August, 1848.]

1. When any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial (a) for the consideration of the justices of either bench and barons of the exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the Court in its discretion shall commit the person convicted to prison, or shall take a recognisance of bail, with one or two sufficient sureties, and in such sum as the Court shall think fit, conditioned to appear at such time or times as the Court shall direct, and receive judgment, or to render himself in execution, as the case may be.

2. The judge or commissioner or Court of quarter sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons, and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require;

(a) Where a prisoner has pleaded guilty to an indictment to which an objection is afterwards taken it is a question which has 'arisen on the trial,' and the Court has

power to entertain the case. See *R. v. Brown*, 24 Q. B. D. 357, commenting on *R. v. Clark*, L. R. 1 C. C. R. 54.

and such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next Court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognisance of bail, if any; and if the Court of oyer and terminer and gaol delivery or Court of quarter sessions shall be directed to give judgment, the said Court shall proceed to give judgment at the next session.

3. [The jurisdiction and authorities by this Act given to the said justices of either bench and barons of the exchequer shall and may be exercised by the said justices and barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the exchequer chamber or other convenient place; and] (b) the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered.

4. The said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.

5. Whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the Court of error shall reverse the judgment, it shall be competent for such Court of error either to pronounce the proper judgment or to remit the record to the Court below, in order that such Court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition.

6. Every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice, or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for any

(b) The words in brackets are repealed by the Statute Law Revision Act, 1875.

term not exceeding ten years, or be imprisoned for any term not exceeding three years, with or without hard labour and solitary confinement, both or either, at the discretion of the Court before which he shall be tried.

## SCHEDULE.

Whereas at the session of the peace for the county of \_\_\_\_\_ held on \_\_\_\_\_ before \_\_\_\_\_ and others their fellows [or at the session of oyer and terminer and gaol delivery held for the county of \_\_\_\_\_ on \_\_\_\_\_ before, among others, Sir *A. B.*, Knight, one of the justices of the court of \_\_\_\_\_ and \_\_\_\_\_ *here name the quorum commissioners*, justices of oyer and terminer and gaol delivery], *A. B.*, late of \_\_\_\_\_ labourer, having been found guilty of felony, and judgment thereupon given, that [state the substance] the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the barons of the exchequer, and execution was thereupon respited in the meantime:

This is to certify, that the said justices and barons having met in the exchequer chamber at Westminster [or Dublin, *as the case may be*] on the \_\_\_\_\_ day of \_\_\_\_\_ it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record that the said *A. B.* ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid; and you are therefore hereby required forthwith to discharge the said *A. B.* from your custody.

To the Gaoler of \_\_\_\_\_ and the Sheriff of \_\_\_\_\_ and all others whom it may concern.

(Signed) *E. F.*

Clerk of the Peace for the County of \_\_\_\_\_  
[or Clerk of Assize for \_\_\_\_\_  
*as the case may be.*]

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47, 'The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either bench and the barons of the Exchequer, by the Act 11 & 12 Vict. c. 78, or any Act amending the same, shall and may be exercised after the commencement of this Act by judges of the High Court of Justice, or five of them, at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs, at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid, shall be final and without appeal, and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent on the record, (c) as to which no question shall have been reserved for the consideration of the said judges under the said Act.'

By the Judicature Act 1881 (44 & 45 Vict. c. 68), s. 15, 'The jurisdiction and authority relating to questions of law arising in criminal trials, which under s. 47 of the Supreme Court of Judicature, Act 1873, is now vested in the judges of the High Court of Justice, may be exercised by any five or more of such judges, notwithstanding the abolition of the offices of Lord Chief Justice of the Common Pleas, and Lord

Chief Baron of the Exchequer, provided that the Lord Chief Justice of England shall always be one of such judges, unless by writing under his hand, or by the certificate in writing of his medical attendant, it shall appear that he is prevented by illness or otherwise from being present at any court duly appointed to be held for the purpose aforesaid, in which case the presence of the said Lord Chief Justice at such court shall not be necessary.'

## ADDENDA

TO

### THE THIRD VOLUME.

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P. 240. — A prisoner charged in the first count, under sec. 5 of 48 & 49 Vict. c. 69, with unlawfully and carnally knowing a girl between the ages of thirteen and sixteen years, and in the second count with an indecent assault, may be convicted on that indictment of a common assault. *R. v. Bostock*, 17 Cox C. C. 700.

P. 240. — A girl under the age of sixteen cannot be convicted for aiding and abetting the commission upon herself of an offence under sec. 5. *R. v. Tyrell*, 17 Cox C. C. 716.

P. 252. — In a charge under sec. 11 of the Criminal Law Amendment Act, 1855, where the prisoner had procured the commission by another male person of an act of gross indecency with the prisoner himself, it was held by the Court for Crown Cases Reserved that the offence was complete. *R. v. Jones & Bowerbank* (1896), 1 Q. B. 4.

P. 272, note (j). — *R. v. Barrett* has been now expressly overruled by the Court for Crown Cases Reserved (Lord Coleridge, C. J., Hawkins, Mathew, Cave, and Day, JJ.) in *R. v. Bellis*, 17 Cox C. C. 660.

P. 284, note (c). — But in a recent case, in which one prisoner was charged with feloniously shooting at a man with intent to do him grievous bodily harm, and another prisoner was charged with feloniously aiding and abetting him to commit the felony, and in which the jury found the one guilty of unlawful wounding, and the other guilty of aiding and abetting, the Court for Crown Cases Reserved (Lord Russell, C. J., Pollock, B., Grantham, Lawrance, and Wright, JJ.) upheld the conviction of both prisoners. The point raised was whether the second prisoner could, on such an indictment, be convicted of aiding and abetting in the misdemeanor. No counsel appeared, and the case of *R. v. Miller*, 14 Cox, 356, and the fact that 14 & 15 Vict. c. 19, s. 5, is limited to cases 'where the

indictment alleges that the defendant did cut, stab, or wound' do not seem to have been present to the minds of the Court. *R. v. Waudby* (1895), 2 Q. B. 482.

P. 349. — In order to constitute the offence of sending a letter demanding money, with menaces, under sec. 44, it is not essential that the menace should be of injury to the person or property, or of an accusation of crime; so, where the prisoner sent a letter to the prosecutor, threatening to tell his wife and his friends of his 'doings with' a certain woman, it was held by the Court for Crown Cases Reserved that the conviction was good. *R. v. Tomlinson* (1895), 1 Q. B. 706.

P. 510, note (t). — *R. v. Gavin* has been followed by Cave, J., in *R. v. Male and Cooper*, 17 Cox C. C. 689.



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